No. 17-368	
Title:	**Salt River Project Agricultural Improvement and Power District, Petitioner v. Tesla Energy Operations, Inc., fka SolarCity Corporation**
Docketed:	September 11, 2017
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(15-17302)
Decision Date:	June 12, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Sep 07 2017	Petition for a writ of certiorari filed. (Response due October 11, 2017)
Oct 11 2017	Brief of respondent SolarCity Corporation in opposition filed.
Oct 11 2017	Brief amici curiae of American Public Power Association, et al. filed.
Oct 31 2017	Reply of petitioner Salt River Project Agricultural Improvement and Power District filed.
Nov 01 2017	DISTRIBUTED for Conference of 11/21/2017.
Nov 27 2017	DISTRIBUTED for Conference of 12/1/2017.
Dec 01 2017	Petition GRANTED.
Dec 07 2017	Blanket Consent filed by Petitioner, Salt River Project Agricultural District **Blanket Consent**
Jan 13 2018	Brief of petitioner Salt River Project Agricultural Improvement and Power District filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 13 2018	Joint appendix filed. (Statement of cost filed.) **Main Document** **Proof of Service**

Jan 22 2018	Brief amici curiae of National Governors Association, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 22 2018	Brief amici curiae of American Public Power Association, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 22 2018	Brief amici curiae of States of Tennessee, Arizona Arkansas Colorado Georgia Idaho Indiana Louisiana Kansas Mississippi Missouri Montana Nebraska New Hampshire Ohio Rhode Island South Carolina South Dakota Texas Utah Vermont West Virginia Wisconsin Wyoming filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 24 2018	SET FOR ARGUMENT ON Monday, March 19, 2018
Feb 07 2018	CIRCULATED
Feb 12 2018	Letter of respondent Tesla Energy Operations, Inc., fka SolarCity Corporation filed. **Main Document**
Feb 12 2018	Brief of respondent Tesla Energy Operations, Inc. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 19 2018	Brief amici curiae of Center for Biological Diversity, et al. filed. (Distributed) **Main Document** **Other** **Proof of Service** **Certificate of Word Count**
Feb 20 2018	Brief amicus curiae of United States filed. (Distributed) **Proof of Service** **Main Document**
Feb 20 2018	Brief amicus curiae of National Federation of Independent Business Small Business Legal Center filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 20 2018	Brief amici curiae of Federal Courts Scholars filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 20 2018	Brief amicus curiae of American Antitrust Institute filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Feb 20 2018	Brief amicus curiae of Public Citizen, Inc. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 20 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

	Proof of Service **Main Document**
Feb 21 2018	Record requested from the U.S.C.A. 9th Circuit.
Feb 26 2018	Record received from the U.S.D.C. Dist. of Arizona - Phoenix. The record is electronic and located on PACER. Part of the record is Sealed and electronic.
Mar 02 2018	Reply of petitioner Salt River Project Agricultural Improvement and Power District filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 05 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 08 2018	Joint letter of March 8, 2018, from counsel received. **Main Document**
Mar 09 2018	This case is removed from the argument calendar for Monday, March 19, 2018, and will be rescheduled for the April 2018 argument session.
Mar 12 2018	RE SET FOR ARUMENT ON Tuesday, April 17, 2018
Mar 20 2018	Stipulation to dismiss the petition for a writ of certiorari pursuant to Rule 46 received. **Main Document**
Mar 22 2018	Petition Dismissed - Rule 46.

NAME	**ADDRESS**	**PHONE**
Attorneys for Petitioner		
Molly S. Boast Counsel of Record	Wilmer Cutler Pickering Hale and Dorr, LLP 7 World Trade Center 250 Greenwich Street New York, NY 10007 Molly.Boast@wilmerhale.com	212 230 8800
Party name: Salt River Project Agricultural Improvement and Power District		
Attorneys for Respondent		
Deanne E. Maynard Counsel of Record	Morrison & Foerster LLP 2000 Pennsylvania Avenue, N.W. Suite 6000 Washington, DC 20006	202-887-8740

	dmaynard@mofo.com	
Party name: Tesla Energy Operations, Inc.		
Richard A. Feinstein	Boies Schiller Flexner, LLP 1401 New York Avenue, N.W. Washington, DC 20005 rfeinstein@bsfllp.com	202-237-6131
Party name: Tesla Energy Operations, Inc.		

Other

John Michael Baker Counsel of Record	Greene Espel, PLLP 222 South Ninth Street Suite 2200 Minneapolis, MN 55402 jbaker@greeneespel.com	(612) 373-0830
Party name: American Public Power Association, et al.		
Andree Kahn Blumstein Counsel of Record	Office of the Tennessee Attorney General P.O. Box 20207 Nashville, TN 37202 andree.blumstein@ag.tn.gov	615-741-3492
Party name: States of Tennessee, Arizona Arkansas Colorado Georgia Idaho Indiana Louisiana Kansas Mississippi Missouri Montana Nebraska New Hampshire Ohio Rhode Island South Carolina South Dakota Texas Utah Vermont West Virginia Wisconsin Wyoming		
Jarod Michael Bona Counsel of Record	Bona Law PC 4275 Executive Square Suite 200 La Jolla, CA 92037 jarod.bona@bonalawpc.com	8589644589
Party name: National Federation of Independent Business Small Business Legal Center		
Richard M. Brunell Counsel of Record	American Antitrust Institute 1025 Connecticut Ave. Suite 1000 Washington, DC 20036 rbrunell@antitrustinstitute.org	2026009640
Party name: American Antitrust Institute		
Howard M. Crystal Counsel of Record	Center for Biological Diversity 1411 K Street NW Suite 1300 Washington, DC 20005 hcrystal@biologicaldiversity.org	202-809-6926
Party name: Center for Biological Diversity, et al.		
Noel J. Francisco	Solicitor General	202-514-2217

Counsel of Record	United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	
Party name: United States of America		
Tillman Lowry Lay Counsel of Record	Spiegel & McDiarmid, LLP 1875 Eye Street NW Suite 700 Washington, DC 20006 tim.lay@spiegelmcd.com	202-879-4000
Party name: National Governors Association, et al.		
Sean Michael Sherman Counsel of Record	Public Citizen Litigation Group 1600 20th Street NW Washington, DC 20009 ssherman@citizen.org	2025881000
Party name: Public Citizen, Inc.		
Stephen I. Vladeck Counsel of Record	727 East Dean Keeton Street Austin, TX 78705 svladeck@law.utexas.edu	5124759198
Party name: Federal Courts Scholars		

CORD
AND
RIEFS

17-368
No. 17-

FILED
SEP - 7 2017
THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Petitioner,

v.

SOLARCITY CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER E. BABBITT
DANIEL S. VOLCHOK
DAVID GRINGER
DANIEL WINIK
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

MOLLY S. BOAST
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
molly.boast@wilmerhale.com

CHRISTOPHER T. CASAMASSIMA
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 S. Grand Avenue
Los Angeles, CA 90071
(213) 443-5300

QUESTION PRESENTED

Whether orders denying state-action immunity to public entities are immediately appealable under the collateral-order doctrine.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 4

JURISDICTION 4

STATUTORY PROVISION INVOLVED 5

STATEMENT 5

A. The Collateral-Order Doctrine 5

B. The District And The 2015 Ratemaking 6

C. District Court Proceedings 7

D. Ninth Circuit Proceedings 9

REASONS FOR GRANTING THE PETITION 10

I. THE QUESTION PRESENTED HAS DIVIDED THE COURTS OF APPEALS 11

A. The 3-2 Circuit Conflict On This Issue Is Entrenched And Widely Acknowledged 11

B. The Contrary Arguments That SolarCity And The Government Made Below Lack Merit 15

TABLE OF CONTENTS—Continued

Page

II. THE QUESTION PRESENTED WARRANTS REVIEW IN THIS CASE 19

A. The Issue Is Important 19

B. This Case Is A Good Vehicle 23

III. THE DECISION BELOW IS WRONG 25

A. Orders Denying State-Action Immunity Are Effectively Unreviewable On Appeal From A Final Judgment 25

B. Denials Of State-Action Immunity On Legal Grounds Conclusively Resolve An Important Issue Separate From The Merits 31

CONCLUSION 35

APPENDIX A: Opinion of the United States Court of Appeals for the Ninth Circuit, dated June 12, 2017 ..... 1a

APPENDIX B: Memorandum of the United States Court of Appeals for the Ninth Circuit, dated June 12, 2017 ..... 19a

APPENDIX C: Order of the United States District Court for the District of Arizona, dated December 21, 2015 ..... 21a

APPENDIX D: Order of the United States District Court for the District of Arizona, dated October 27, 2015 ..... 37a

TABLE OF AUTHORITIES

CASES

Page(s)

Abney v. *United States*, 431 U.S. 651 (1977) 21

Acoustic Systems, Inc. v. *Wenger Corp.*, 207 F.3d 287 (5th Cir. 2000) 16

Alden v. *Maine*, 527 U.S. 706 (1999) 30

Askew v. *DCH Regional Health Care Authority*, 995 F.2d 1033 (11th Cir. 1993) 12

Auraria Student Housing at the Regency, LLC v. *Campus Village Apartments, LLC*, 703 F.3d 1147 (10th Cir. 2013) 15, 16

Ball v. *James*, 451 U.S. 355 (1981) 18

Beame v. *Friends of the Earth*, 434 U.S. 1310 (1977) 8

Bell Atlantic Corp. v. *Twombly*, 550 U.S. 544 (2007) 28

Bolt v. *Halifax Hospital Medical Center*, 980 F.2d 1381 (11th Cir. 1993) 12

Brentwood Academy v. *Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001) 19

Bullard v. *Blue Hills Bank*, 135 S. Ct. 1686 (2015) 21

California Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) 2

City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978) 4, 25

TABLE OF AUTHORITIES—Continued

Page(s)

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) 17, 31

Columbia Steel Casting Co. v. *Portland General Electric Co.*, 111 F.3d 1427 (9th Cir. 1997) 9

Community Communications Co. v. *City of Boulder*, 455 U.S. 40 (1982) 2, 25

Commuter Transportation Systems, Inc. v. *Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986) 2, 11, 23, 27

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 21

Cunningham v. *Hamilton County*, 527 U.S. 198 (1999) 20

Danner Construction Co. v. *Hillsborough County*, 608 F.3d 809 (11th Cir. 2010) 11

Digital Equipment Corp. v. *Desktop Direct, Inc.*, 511 U.S. 863 (1994) 5

Earles v. *State Board of Certified Public Accountants of Louisiana*, 139 F.3d 1033 (5th Cir. 1998) 13

Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368 (1981) 21

Flanagan v. *United States*, 465 U.S. 259 (1984) 17

FTC v. *Phoebe Putney Health System, Inc.*, 568 U.S. 216 (2013) 2, 4, 33

TABLE OF AUTHORITIES—Continued

Page(s)

FTC v. *Ticor Title Insurance Co.*, 504 U.S. 621 (1992) 2

Gelboim v. *Bank of America Corp.*, 135 S. Ct. 897 (2015) 5, 21

Gulfstream Aerospace Corp. v. *Mayacamas Corp.*, 485 U.S. 271 (1988) 32

Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 27

Helstoski v. *Meanor*, 442 U.S. 500 (1979) 21

Hohokam Irrigation & Drainage District v. *Arizona Public Service Co.*, 64 P.3d 836 (Ariz. 2003) 6

Huron Valley Hospital, Inc. v. *City of Pontiac*, 792 F.2d 563 (6th Cir. 1986) 3, 13, 23

Kingdomware Technologies, Inc. v. *United States*, 136 S. Ct. 1969 (2015) 24

Lauro Lines s.r.l. v. *Chasser*, 490 U.S. 495 (1989) 20, 28

Manuel v. *City of Joliet*, 137 S. Ct. 911 (2017) 15

Martin v. *Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996) ..... *passim*

Microsoft Corp. v. *Baker*, 137 S. Ct. 1702 (2017) 21

Midland Asphalt Corp. v. *United States*, 489 U.S. 794 (1989) 20

Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 12, 33, 34

Mohawk Industries, Inc. v. *Carpenter*, 558 U.S. 100 (2009) 17

TABLE OF AUTHORITIES—Continued

Page(s)

Mothershed v. *Justices of the Supreme Court*, 410 F.3d 602 (9th Cir. 2005) 23

North Carolina State Board of Dental Examiners v. *FTC*, 135 S. Ct. 1101 (2015) 1, 2, 25, 26

Osborn v. *Haley*, 549 U.S. 225 (2007) 17

Parker v. *Brown*, 317 U.S. 341 (1943) 1, 25, 26

Praxair, Inc. v. *Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995) 12

Puerto Rico Aqueduct & Sewer Authority v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 12, 26

Richardson-Merrell, Inc. v. *Koller*, 472 U.S. 424 (1985) 17

Salt River Project Agricultural Improvement & Power District v. *City of Phoenix*, 631 P.2d 553 (Ariz. Ct. App. 1981) 6

Segni v. *Commercial Office of Spain*, 816 F.2d 344 (7th Cir. 1987) 14

Sell v. *United States*, 539 U.S. 166 (2003) 17

Shames v. *California Travel & Tourism Commission*, 626 F.3d 1079 (9th Cir. 2010) 33

Shelby County v. *Holder*, 133 S. Ct. 2612 (2013) 19

South Carolina State Board of Dentistry v. *FTC*, 455 F.3d 436 (4th Cir. 2006) ..... *passim*

Southern Motor Carriers Rate Conference v. *United States*, 471 U.S. 48 (1985) 33

Stack v. *Boyle*, 342 U.S. 1 (1951) 21

TABLE OF AUTHORITIES—Continued

Page(s)

Surgical Care Center of Hammond, L.C. v. *Hospital Service District No. 1 of Tangipahoa Parish*, 171 F.3d 231 (5th Cir. 1999) 16

Swint v. *Chambers County Commission*, 514 U.S. 35 (1995) 9, 31

TEC Cogeneration Inc. v. *Florida Power & Light Co.*, 76 F.3d 1560 (11th Cir. 1996) 12

Texaco, Inc. v. *Department of Energy*, 663 F.2d 158 (D.C. Cir. 1980) 24

Tidewater Oil Co. v. *United States*, 409 U.S. 151 (1972) 22

Town of Hallie v. *City of Eau Claire*, 471 U.S. 34 (1985) 2

Van Cauwenberghe v. *Biard*, 486 U.S. 517 (1988) 21

Verizon Communications, Inc. v. *FCC*, 535 U.S. 467 (2002) 23

We, Inc. v. *City of Philadelphia*, 174 F.3d 322 (3d Cir. 1999) 14, 15

Will v. *Hallock*, 546 U.S. 345 (2006) 20, 28, 29

Wreal, LLC v. *Amazon.com, Inc.*, 840 F.3d 1244 (11th Cir. 2016) 8

CONSTITUTIONAL AND STATUTORY PROVISIONS

Ariz. Const. art. XIII, §7 ..... 6, 18

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C.
§1254 4
§1291 5
§1292 ..... 8, 31
§1331 8
§1337 8
§1367 8

Ariz. Rev. Stat.
§12-820.01 10
§30-801 6
§30-802 6
§30-811 7
§30-812 7
§48-2302 ..... 6, 18
§48-2334 7

RULES

Fed. R. Civ. P. 37 20

Fed. R. Crim. P. 6 20

S. Ct. R. 14.1 8

OTHER AUTHORITIES

Areeda, Phillip E. & Herbert Hovenkamp, *Fundamentals of Antitrust Law* §2.04 (4th ed. & 2015 Supp.) 26, 27

TABLE OF AUTHORITIES—Continued

Page(s)

Brief for the United States as Amicus Curiae, *Auraria Student Housing at the Regency, LLC* v. *Campus Village Apartments, LLC*, No. 11-1569, 2012 WL 1387342 (10th Cir. Jan. 4, 2013) 22

Brief for the United States as Amicus Curiae, *Mohawk Industries, Inc.* v. *Carpenter*, No. 08-678 (U.S. July 13, 2009) 18

Brief for the United States, *Osborn* v. *Haley*, No. 05-593 (U.S. Sept. 1, 2006) 17, 18

Kornmehl, Jason, *State Action on Appeal:* Parker *Immunity and the Collateral Order Doctrine in Antitrust Litigation*, 39 Seattle U. L. Rev. 1 (2015) 15, 22

Manual for Complex Litigation, Fourth § 30 (2004) 28

Salt River Project (SRP), http://arizonagoessolar.org/UtilityPrograms/SaltRiverProject.aspx (visited Sept. 6, 2017) 7

U.S. Attorneys' Manual § 2-2.123 22

IN THE

Supreme Court of the United States

No. 17-

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Petitioner,

v.

SOLARCITY CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Salt River Project Agricultural Improvement and Power District respectfully petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

Starting with *Parker* v. *Brown*, 317 U.S. 341 (1943), this Court has consistently "interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity," *North Carolina State Board of Dental Examiners* v. *FTC*, 135 S. Ct. 1101, 1110 (2015). This immunity, known as state-action immunity or *Parker* immunity, "reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitu-

tion." *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 53 (1982). State-action immunity covers not only states but also their political subdivisions, so long as a subdivision's alleged anticompetitive conduct was undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition. *FTC* v. *Phoebe Putney Health System, Inc.*, 568 U.S. 216, 226 (2013).[1]

This petition presents a question about state-action immunity that has divided the courts of appeals: Is immediate appeal available under the collateral-order doctrine from an interlocutory order denying a public entity's assertion of the immunity?

The Fifth and Eleventh Circuits have held that the answer is yes. *See Martin* v. *Memorial Hospital at Gulfport*, 86 F.3d 1391, 1395-1397 (5th Cir. 1996); *Commuter Transportation Systems, Inc.* v. *Hillsborough County Aviation Authority*, 801 F.2d 1286, 1289-1290 (11th Cir. 1986). These courts have held that state-action immunity, like sovereign immunity and qualified immunity, is an immunity against suit rather than a mere defense against liability. They have accordingly concluded that if a denial of state-action immunity cannot be appealed immediately, then in effect it cannot be appealed at all. Once a public entity has been subjected to the burdens of litigation beyond a

---

[1] Private entities (and public entities that are not electorally accountable) can receive state-action immunity if they act pursuant to a clearly articulated state policy *and* are actively supervised by the state. *See FTC* v. *Ticor Title Insurance Co.*, 504 U.S. 621, 633 (1992) (citing *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)); *North Carolina State Board*, 135 S. Ct. at 1112 (citing *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 46-47 (1985)).

motion to dismiss, the immunity against suit has been irredeemably lost; no subsequent appeal can restore it.

By contrast, the Fourth and Sixth Circuits—and now in this case the Ninth Circuit—have held that the interlocutory denial of state-action immunity to a public entity is not immediately appealable. *See* App. 14a-15a; *South Carolina State Board of Dentistry* v. *FTC*, 455 F.3d 436, 441-447 (4th Cir. 2006); *Huron Valley Hospital, Inc.* v. *City of Pontiac*, 792 F.2d 563, 567-568 (6th Cir. 1986). They have reached that result by holding that state-action immunity is merely a defense against liability rather than an immunity from suit.

This entrenched division among the courts of appeals—which has been acknowledged by courts on both sides of the divide as well as by commentators—warrants resolution. It has been illuminated by extensive judicial analysis, leaving little to be gained from further percolation. It will not be resolved without this Court's intervention. And it is important to the administration of the antitrust laws. This Court has repeatedly agreed to clarify whether particular orders fall within the scope of the collateral-order doctrine, and the need for clarity is especially acute in the antitrust context, where the Court has emphasized the need for national uniformity.

Finally, the decision below is incorrect. Like the Fourth and Sixth Circuits, the Ninth Circuit gave short shrift to the sovereignty and federalism interests that underlie state-action immunity. An important part of states' sovereignty is the ability to choose how they will regulate their economies within their own borders. Some may choose to do so indirectly rather than directly, by enlisting the assistance of political subdivisions—and state-action immunity is meant to "'preserve[] ...

their freedom ... to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws.'" *Phoebe Putney*, 568 U.S. at 226 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (plurality opinion)). Allowing states' subdivisions to be haled into court under federal law for providing such assistance, i.e., for acting pursuant to a state's clearly articulated policy, intrudes sharply on the state's sovereignty and prerogatives. It also inhibits states' ability to set policy—and subdivisions' ability to carry out that policy—with the goal of promoting the public interest, rather than the goal of simply avoiding an antitrust lawsuit. A denial of state-action immunity is thus precisely the sort of consequential decision, irreparable on appeal from a subsequent final judgment, that warrants immediate appellate review.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-17a) is reported at 859 F.3d 720. The court's unpublished memorandum (App. 19a-20a), issued concurrently with the published opinion, is not yet reported but is available at 2017 WL 2535579. The district court's two relevant orders—denying dismissal based on state-action immunity (App. 37a-69a) and refusing to certify that ruling for interlocutory appeal (App. 21a-35a)—are unreported but available at 2015 WL 6503439 and 2015 WL 9268212, respectively.

JURISDICTION

The court of appeals entered judgment on June 12, 2017. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

This Court has described the collateral-order doctrine as a "practical construction" of 28 U.S.C. §1291. *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). That provision states that "[t]he courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ... except where a direct review may be had in the Supreme Court."

STATEMENT

A. The Collateral-Order Doctrine

Courts of appeals normally have jurisdiction only over district courts' final judgments. *See* 28 U.S.C. §1291. But "[u]nder the collateral order doctrine, an order may be deemed 'final' if it disposes of a matter separable from, and collateral to the merits of the main proceeding." *Gelboim* v. *Bank of America Corp.*, 135 S. Ct. 897, 905 n.5 (2015) (quotation marks omitted). To fall within the collateral-order doctrine, a ruling must (1) be "conclusive," (2) "resolve important questions completely separate from the merits," and (3) be "effectively unreviewable on appeal from final judgment." *Digital Equipment*, 511 U.S. at 867. In applying this standard, a court looks to "the entire category to which a claim belongs," *id.* at 868.

Although this Court has emphasized that collateral-order appeal is a narrow exception to the final-judgment rule, it has held that a variety of orders qualify for such appeal. These include orders denying absolute immunity, state sovereign immunity, or (where it turns on a question of law) qualified immunity; rejecting a double-jeopardy defense; authorizing the forced medication of a mentally ill criminal defendant so that

he can be tried; denying certification and substitution under the Westfall Act; and refusing to reduce bail, to dismiss an indictment on speech-or-debate grounds, or to require the posting of a security bond. *See infra* pp.20-21 (citing cases).

B. The District And The 2015 Ratemaking

Petitioner, the Salt River Project Agricultural Improvement and Power District, is "a public, political, taxing subdivision of" Arizona. Ariz. Rev. Stat. §48-2302; *see also, e.g.*, *Salt River Project Agricultural Improvement & Power District* v. *City of Phoenix*, 631 P.2d 553, 555 (Ariz. Ct. App. 1981) (noting this fact). The District is a public utility that delivers water to a 375-square-mile area of central Arizona. It supports those operations by selling electricity to roughly a million members of the public in metropolitan Phoenix. With caveats not relevant here, the Arizona Constitution provides that the District is "entitled to the immunities and exemptions granted municipalities and political subdivisions under this constitution or any law of the state or of the United States." Ariz. Const. art. XIII, §7, *quoted in Hohokam Irrigation & Drainage District* v. *Arizona Public Service Co.*, 64 P.3d 836, 839 (Ariz. 2003) (en banc).

Arizona law classifies the District as a "public power entity," and the state legislature has delegated to such entities the right to set electric rates—i.e., to "determine terms and conditions for competition in the retail sale of electric generation service," including "distribution service rates and charges." Ariz. Rev. Stat. §30-802(A), (B); *see also id.* §30-801(16) (defining "[p]ublic power entity"). The legislature has also prescribed notice-and-comment procedures for the District and other public power entities to follow in exercising

their ratemaking authority, *see id.* §48-2334(B), (E), as well as mechanisms for those who are dissatisfied with the setting of electricity rates to seek redress in state court, *see id.* §§30-811(A), 30-812(A).

In 2014, the District provided public notice that it was considering a new rate structure for "self-generating customers," meaning those who generate some electricity through rooftop solar systems or other alternative sources, but who still need to buy electricity from the District when alternative sources are insufficient to meet their needs. App. 40a-41a. After holding hearings and receiving comments, the District promulgated new rates in 2015. *Id.*

C. District Court Proceedings

SolarCity sold and leased rooftop solar systems to customers in the District and elsewhere. App. 2a-3a. Shortly after the District's new rate structure took effect, SolarCity (forgoing the state-provided mechanisms for judicial review) filed this action in federal court in Arizona, claiming that the new rates harmed it and its customers, including by diminishing demand for its products. App. 3a.[2]

---

[2] SolarCity's response to this petition may rehash its preferred narrative about the supposed illegality of the District's conduct and the harm that conduct has purportedly inflicted on competition generally and SolarCity in particular. That narrative is irrelevant to the question presented, and in any event difficult to reconcile with the facts. For example, hundreds of District customers have installed solar systems—through SolarCity's competitors—since SolarCity withdrew from the District's service area upon filing this action. *See* http://arizonagoessolar.org/Utility Programs/SaltRiverProject.aspx (visited Sept. 6, 2017). And SolarCity's claim to have been irreparably harmed by the new rate structure is belied by the fact that it waited over sixteen months

The operative complaint alleges that the District's ratemaking violated federal antitrust law, and in particular that the District engaged in monopoly maintenance and attempted monopolization, each in violation of §2 of the Sherman Act; an unreasonable restraint of trade, in violation of §1; and exclusive dealing, in violation of §3 of the Clayton Act. App. 41a. SolarCity also brought claims under Arizona's antitrust statute and common law. App. 41a-42a.[3]

The District moved to dismiss the complaint on numerous grounds, including that it is immune from SolarCity's antitrust claims under the state-action doctrine because the alleged anticompetitive conduct is ratemaking and Arizona's explicit delegation of ratemaking authority to the District means the state has clearly articulated a policy of allowing the District to engage in that conduct. App. 45a. The district court granted the motion in part and denied it in part; of particular relevance here, it rejected the District's assertion of state-action immunity. App. 67a.

The court initially held that application of the state-action immunity doctrine here required factual determinations that were inappropriate on a motion to dismiss. App. 67a. The District then moved for certification of an interlocutory appeal under 28 U.S.C. §1292(b). The district court denied that motion, but in

---

after suing to seek a preliminary injunction (and even then did so only conditionally). *See, e.g., Beame* v. *Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers); *Wreal, LLC* v. *Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) (citing cases).

[3] The district court had subject-matter jurisdiction over SolarCity's federal antitrust claims under 28 U.S.C. §§1331 and 1337(a), and over SolarCity's state-law claims under 28 U.S.C. §1367(a). *See* S. Ct. R. 14.1(g)(ii).

doing so it recognized, contrary to its initial opinion, that "'[t]he state-action immunity question is one of law.'" App. 25a (quoting *Columbia Steel Casting Co.* v. *Portland General Electric Co.*, 111 F.3d 1427, 1442 (9th Cir. 1996)). The court then reaffirmed its denial of immunity as a matter of law, opining that "Arizona has not expressly articulated a clear policy authorizing the conduct of the District." *Id.*

D. Ninth Circuit Proceedings

The District filed a timely notice of appeal, asserting as a basis for appellate jurisdiction that "denials of immunities from suit are subject to immediate appellate review" under the collateral-order doctrine. C.A. Excerpts of Record 42.

After briefing and argument, the Ninth Circuit disagreed and dismissed the appeal for lack of jurisdiction. The court did not address the first two prerequisites for immediate appealability, namely that the order sought to be appealed be "conclusive" and "resolve important questions separate from the merits," *Swint* v. *Chambers County Commission*, 514 U.S. 35, 42 (1995). *See* App. 11a n.4. Instead, the court focused on the third prerequisite, that the order be "effectively unreviewable on appeal from the final judgment in the underlying action," *Swint*, 514 U.S. at 42. The court recognized that the collateral-order doctrine allows immediate appeals from the "denial[] of certain particularly important immunities from suit"—including "Eleventh Amendment immunity," "absolute immunity," "qualified immunity," "foreign sovereign immunity," and "tribal sovereign immunity." App. 7a-8a. But the court reasoned that state-action immunity, unlike the others, is a defense against liability rather than an immunity from suit. App. 8a-11a. And "[u]nlike immunity from

suit," the court opined, "immunity from liability can be protected by a post-judgment appeal." App. 8a.

The court of appeals recognized that its holding deepened an established conflict among the circuits. It first stated that its "conclusion that an order denying state-action immunity is not appealable under the collateral-order doctrine comports with decisions of the Fourth and Sixth Circuits." App. 14a (citing *South Carolina State Board* and *Huron Valley*). But it went on to "acknowledge that two circuits have reached the opposite conclusion." App 15a-16a (citing *Martin* and *Commuter Transportation*).

In an unpublished memorandum issued concurrently with its published opinion, the Ninth Circuit held that it lacked jurisdiction to consider the District's alternative arguments for dismissal of the complaint under Arizona Revised Statutes §12-820.01 and the filed-rate doctrine. App. 20a. This petition does not address those holdings.

The court of appeals subsequently denied the District's motion to stay the issuance of its mandate pending the filing and disposition of this petition.

REASONS FOR GRANTING THE PETITION

This case implicates an established and recognized conflict between the Fourth, Sixth, and Ninth Circuits on one hand, and the Fifth and Eleventh Circuits (supported by dicta of the Third and Seventh Circuits) on the other. The question presented is important and the Ninth Circuit's resolution of it was incorrect. Certiorari is therefore warranted.

I. THE QUESTION PRESENTED HAS DIVIDED THE COURTS OF APPEALS

A. The 3-2 Circuit Conflict On This Issue Is Entrenched And Widely Acknowledged

As the decision below discussed at length, the question presented has engendered a division among the circuits—a division recognized by courts on both sides (which have engaged with each other's reasoning) as well as by commentators. This division is very unlikely to be resolved without this Court's intervention.

1. The Fifth and Eleventh Circuits have held that denials of state-action immunity to public entities are immediately appealable under the collateral-order doctrine.

The Eleventh Circuit so held in *Commuter Transportation*. It reasoned that state-action immunity, like qualified immunity, is an "immunity from suit rather than a mere defense to liability." 801 F.2d at 1289 (emphasis omitted). Like qualified immunity, the court expounded, state-action immunity is meant "to avoid needless waste of public time and money" by ensuring that government officials do not "avoid decisions involving antitrust laws which would expose [them] to costly litigation and conclusory allegations." *Id.* The court thus held that orders denying state-action immunity are "effectively unreviewable on appeal from a final judgment," and further held that such orders satisfy the other two predicates for collateral-order review: They are "conclusive[]" and they "resolve[] an important issue separate from the merits" of antitrust liability. *Id.* at 1289-1290.

The Eleventh Circuit has adhered to its holding in subsequent cases, including *Danner Construction Co.*

v. *Hillsborough County*, 608 F.3d 809, 812 n.1 (11th Cir. 2010); *TEC Cogeneration Inc.* v. *Florida Power & Light Co.*, 76 F.3d 1560, 1564 (11th Cir. 1996), *modified on reh'g*, 86 F.3d 1028 (11th Cir. 1996); *Praxair, Inc.* v. *Florida Power & Light Co.*, 64 F.3d 609, 611 (11th Cir. 1995); *Askew* v. *DCH Regional Health Care Authority*, 995 F.2d 1033, 1036-1037 (11th Cir. 1993); and *Bolt* v. *Halifax Hospital Medical Center*, 980 F.2d 1381, 1389 n.5 (11th Cir. 1993).

The Fifth Circuit followed the Eleventh in *Martin*, holding that "state action immunity shares the essential element of absolute, qualified and Eleventh Amendment immunities—'an entitlement not to stand trial under certain circumstances'"—and that a denial of such immunity is therefore "effectively unreviewable on appeal from a final judgment." 86 F.3d at 1395-1396 (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985)). "One of the primary justifications of state action immunity," the court explained, "is the same as that of Eleventh Amendment immunity—'to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,' and to 'ensure that the States' dignitary interests can be fully vindicated.'" *Id.* (quoting *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). The court of appeals also relied on the need to avoid "the general costs of subjecting officials to the risks of trial," such as "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.* at 1396. And, like the Eleventh Circuit, the court held that orders denying state-action immunity are both conclusive and separate from the merits of antitrust liability. *Id.* at 1396-1397.

The Fifth Circuit adhered to *Martin*'s holding in *Earles* v. *State Board of Certified Public Accountants of Louisiana*, 139 F.3d 1033, 1036 (5th Cir. 1998).

2. In conflict with the Fifth and Eleventh Circuits, the Fourth, Sixth, and now Ninth Circuits have held that denials of state-action immunity to public entities are not immediately appealable.

The Sixth Circuit reached that conclusion first, in *Huron Valley*. The court based its holding on the premise that "the [state-action] exemption is not an 'entitlement' of the same magnitude as qualified immunity or absolute immunity, but rather is more akin to a defense to the original claim." 792 F.2d at 567. The court did not explain how it ranked immunity doctrines by "magnitude," or why a given form of immunity must qualify as an "'entitlement'" for its denial to be appealable. But on the premise that state-action immunity is a mere "defense," the court reasoned that "[r]eview of the denial on direct appeal" suffices to "afford[] the necessary protection if the defense is valid." *Id.* It further held that denials of state-action immunity are not "completely separate from the merits of the original claim." *Id.*

The Fourth Circuit followed the Sixth in *South Carolina State Board*. The court there opined that this Court, in first articulating state-action immunity in *Parker*, "did not identify or articulate a constitutional or common law 'right not to be tried,'" nor did it "protect against any harm other than a misinterpretation of federal antitrust laws." 455 F.3d at 444-445. The court thus interpreted *Parker* as "recogniz[ing] a 'defense' qualitatively different from the immunities" for which collateral-order appeal is available—i.e., immunities that "focus on the harms attendant to litigation it-

self'—and accordingly held that a denial of state-action immunity "is not 'effectively unreviewable' after trial." *Id.* at 443-444. A majority of the panel further held that orders denying state-action immunity are "not separable from the merits of the underlying action." *Id.* at 442. *Contra id.* at 447 (Traxler, J., concurring in part and concurring in the judgment).

As discussed, the Ninth Circuit in this case joined the Fourth and Sixth Circuits in holding that a denial of state-action immunity to a public entity is not immediately appealable because it is effectively reviewable on appeal from a final judgment. *See supra* pp.9-10. Like those courts, the Ninth Circuit explained that it regards state-action immunity as "a defense to liability," rather than an "immunity from suit" or "a safeguard of state sovereign immunity." App. 8a-9a.

3. As the Fourth Circuit recognized, the Third and Seventh Circuits have "suggested ... in dicta" that "the denial of *Parker* protection" is immediately appealable. *South Carolina State Board*, 455 F.3d at 441. The Seventh Circuit did so in *Segni* v. *Commercial Office of Spain*, 816 F.2d 344 (7th Cir. 1987), which concluded that the denial of an asserted First Amendment immunity is not appealable under the collateral-order doctrine. In reaching that conclusion, the court distinguished *Commuter Transportation* on the basis that the Eleventh Circuit "was careful to point out that the [state-action] doctrine had been interpreted to create an immunity from suit and not just from judgment—to spare state officials the burdens and uncertainties of the litigation itself as well as the cost of an adverse judgment." *Id.* at 346. In *We, Inc.* v. *City of Philadelphia*, 174 F.3d 322 (3d Cir. 1999), the Third Circuit recounted *Segni*'s rationale for distinguishing state-action

immunity and "agree[d] with [its] conclusion," *id.* at 329.

4. Both courts and commentators have recognized the circuit conflict, and they agree on its contours. *See* App. 14a-17a; *Auraria Student Housing at the Regency, LLC* v. *Campus Village Apartments, LLC*, 703 F.3d 1147, 1150 (10th Cir. 2013); *South Carolina State Board*, 455 F.3d at 441; Kornmehl, *State Action on Appeal:* Parker *Immunity and the Collateral Order Doctrine in Antitrust Litigation*, 39 Seattle U. L. Rev. 1, 4-5 (2015). Courts on both sides of the conflict, moreover, have acknowledged each other's decisions and engaged with each other's reasoning. *See Martin*, 86 F.3d at 1396; *South Carolina State Board*, 455 F.3d at 441, 443, 446; App. 15a-17a. This is therefore not a conflict that could plausibly be sharpened or eliminated through further percolation. The courts of appeals are divided along clear lines, and there is every reason to believe they will remain divided unless this Court intervenes.

B. The Contrary Arguments That SolarCity And The Government Made Below Lack Merit

1. In opposing the District's motion for the Ninth Circuit to stay the issuance of its mandate, SolarCity argued (at 10) that certiorari is unnecessary because the courts of appeals are already "aligning" around the view that there is no immediate appeal in these circumstances. That is incorrect.

To begin with, SolarCity cited nothing to suggest "alignment" by the Eleventh Circuit—and there is nothing. That alone rebuts SolarCity's contention, because a conflict with even one circuit on one side would be a sufficient basis for certiorari. *See, e.g.*, *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 917 (2017).

As to the Fifth Circuit, SolarCity argued (Stay Opp. 10-11) that *Martin* had implicitly been abrogated by *Surgical Care Center of Hammond, L.C.* v. *Hospital Service District No. 1 of Tangipahoa Parish*, 171 F.3d 231 (5th Cir. 1999) (en banc). That is wrong. Although the court in *Surgical Care* observed that the "parentage" of the state-action immunity doctrine "differs from the qualified and absolute immunities of public officials," *id.* at 234, *Surgical Care* had nothing to do with collateral-order jurisdiction, and the court never even cited *Martin*. The court has since made clear, moreover—in an opinion also citing *Surgical Care*—that *Martin* remains controlling. *See Acoustic Systems, Inc.* v. *Wenger Corp.*, 207 F.3d 287, 290-291 (5th Cir. 2000); *see also id.* at 292 n.3 (discussing *Surgical Care*). Not surprisingly, then, the Ninth Circuit here rejected SolarCity's contention, explicitly recognizing (as noted) that its decision departed from Fifth Circuit law. App. 15a-16a.[4]

More generally, SolarCity argued below (Stay Opp. 11-12) that "alignment" of the circuits was inevitable because this Court, over the past two decades, has consistently narrowed the collateral-order doctrine. In reality, the Court's recent collateral-order decisions have gone both ways. Some decisions have held that particu-

---

[4] *Acoustic Systems* held that *private* parties cannot immediately appeal a denial state-action immunity. 207 F.3d at 292. The Tenth Circuit—after noting but expressly not "weigh[ing] in on the circuit split" regarding the question presented here—reached the same conclusion in *Auraria*. 703 F.3d at 1151. Those holdings are irrelevant here because the District is a public entity. *See supra* pp.6-7; *infra* pp.18-19; App. 3a. Lower courts' willingness to allow immediate appeal by public but not private defendants who are denied state-action immunity mirrors what the circuits have done "in the context of qualified immunity." *Auraria*, 703 F.3d at 1151.

lar orders were not immediately appealable, while others—such as *Osborn* v. *Haley*, 549 U.S. 225, 237-239 (2007), and *Sell* v. *United States*, 539 U.S. 166, 175-177 (2003)—have allowed immediate appeals from other orders. That may explain why SolarCity cited nothing from the Fifth Circuit or the Eleventh Circuit suggesting "alignment" over the *seven years* since *Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100 (2009), the last collateral-order decision by this Court that SolarCity cited.

Likewise meritless is the related argument made in merits briefing below (by both SolarCity and the government) that the Fifth and Eleventh Circuit decisions on this issue predate decisions from this Court making clear that the collateral-order doctrine is narrow. This Court actually made that point in its seminal collateral-order case, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), and reiterated the point several times before the Fifth and Eleventh Circuit held denials of state-action immunity immediately appealable, *see, e.g.*, *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 430 (1985); *Flanagan* v. *United States*, 465 U.S. 259, 265, 270 (1984). Contrary to SolarCity's and the government's suggestion below, moreover, the mere fact that the collateral-order doctrine is narrow says nothing about whether particular orders fall within it. Indeed, the same generic point could be made in a case involving denials of sovereign immunity or qualified immunity, which are indisputably subject to immediate appeal.[5]

---

[5] The government's arguments below about the need to keep the collateral-order doctrine narrow (C.A. Br. 9-12) rang particularly hollow given its repeated willingness to urge this Court to *broaden* the doctrine when doing so served its interests. *See* U.S.

Put simply, there is no realistic prospect that the circuit conflict on the question presented will resolve itself.

2. SolarCity also asserted below (Stay Opp. 14) that the circuit conflict is not implicated here because the District is a private entity, and no court of appeals has held that denials of state-action immunity to private entities are immediately appealable. That argument also lacks merit.

This Court has described the District as both a "public entity" and "a governmental entity." *Ball* v. *James*, 451 U.S. 355, 357 (1981). Those observations were correct: Under Arizona law, the District is "a public, political, taxing subdivision of the state." Ariz. Rev. Stat. §48-2302. And the state constitution imbues the District with all "immunities and exemptions granted municipalities and political subdivisions under" state or federal law. Ariz. Const. art. XIII, §7. None of the issues SolarCity has persistently raised about the District's history, structure, or operations changes these dispositive points about the District's status.

In *Ball*, moreover, this Court held that although the District is not subject to the Equal Protection Clause's one-person, one-vote requirement (as the plaintiff there alleged), it *is* subject to a less-stringent equal-protection standard. Were the District a private

---

Br. 13-15, *Osborn*, No. 05-593 (U.S. Sept. 1, 2006), at https://www.justice.gov/sites/default/files/osg/briefs/2006/01/01/2005-0593.mer.aa.pdf; U.S. Br. 28-32, *Mohawk*, No. 08-678 (U.S. July 13, 2009), at https://www.justice.gov/sites/default/files/osg/briefs/2009/01/01/2008-0678.mer.ami.pdf.

entity, the Court would have held simply that the District is not subject to the Equal Protection Clause.[6]

All this likely explains why the Ninth Circuit did not agree with SolarCity's argument that the District is a private entity. In fact, although SolarCity presented that argument at length in its brief, the court of appeals never mentioned it. And as discussed, the court described its decision as taking sides in the entrenched circuit conflict concerning denials of state-action immunity to public entities.

II. The Question Presented Warrants Review In This Case

A. The Issue Is Important

The circuit conflict described above warrants resolution by this Court. Nationwide uniformity as to the scope of the collateral-order doctrine is important, as is uniformity in the application of the antitrust laws. That is particularly true where the division among the courts of appeals leaves states with disparate degrees of protection for their sovereignty interests, violating the "'fundamental principle of *equal* sovereignty' among the States," *Shelby County* v. *Holder*, 133 S. Ct. 2612, 2623 (2013).

---

[6] To be sure, private conduct can be challenged on equal-protection grounds if "there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State." *Brentwood Academy* v. *Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quotation marks omitted). But nothing in *Ball* remotely suggests that this Court deemed equal-protection requirements applicable to the District because of such a nexus. The Court instead assumed the state-action requirement was met—because it (rightly) did not view the District as private.

This Court—perhaps recognizing that it is wasteful and disruptive for courts and litigants to struggle with whether an order may be appealed before reaching the merits of an appeal—has frequently agreed to decide whether particular orders are immediately appealable. More specifically, the Court has addressed the immediate appealability of orders:

- rejecting attorney-client privilege, in *Mohawk*;
- rejecting certification and substitution under the Westfall Act, in *Osborn*;
- rejecting a judgment-bar defense under the Federal Tort Claims Act, in *Will* v. *Hallock*, 546 U.S. 345 (2006);
- authorizing forced medication of a mentally ill criminal defendant so that trial can proceed, in *Sell*;
- imposing sanctions under Federal Rule of Civil Procedure 37(a)(4), in *Cunningham* v. *Hamilton County*, 527 U.S. 198 (1999);
- denying effect to settlement agreements, in *Digital Equipment*;
- denying Eleventh Amendment immunity, in *Puerto Rico Aqueduct*;
- denying motions to dismiss on the basis of a forum-selection clause, in *Lauro Lines s.r.l.* v. *Chasser*, 490 U.S. 495 (1989);
- denying motions to dismiss under Federal Rule of Criminal Procedure 6(e), in *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794 (1989);
- denying motions to dismiss on the ground of forum non conveniens or of an extradited person's

immunity from service of process, in *Van Cauwenberghe* v. *Biard*, 486 U.S. 517 (1988);

- rejecting qualified immunity, in *Mitchell*;
- disqualifying counsel in a civil case, in *Richardson-Merrell*, or declining to do so, in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981);
- disqualifying counsel in a criminal case, in *Flanagan*;
- denying class certification, in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978);
- denying a motion to dismiss on speech-or-debate grounds, *Helstoski* v. *Meanor*, 442 U.S. 500 (1979);
- denying motions to dismiss on double-jeopardy grounds, in *Abney* v. *United States*, 431 U.S. 651 (1977);
- denying a motion to reduce bail, in *Stack* v. *Boyle*, 342 U.S. 1 (1951); and
- refusing to require posting of a security bond, in *Cohen*.

The Court has also regularly taken up other issues regarding the finality requirement for appellate jurisdiction. In just the past few Terms, the Court has decided such questions in *Microsoft Corp.* v. *Baker*, 137 S. Ct. 1702 (2017), *Bullard* v. *Blue Hills Bank*, 135 S. Ct. 1686 (2015), and *Gelboim*, 135 S. Ct. 897.

The issue here is as worthy of review as those the Court has considered in the past. "The fact that seven of the thirteen federal courts of appeals have addressed the [question presented] ... demonstrates the signifi-

cance and complexity of this procedural issue in antitrust litigation." Kornmehl, *supra*, at 5. And state-action immunity is regularly litigated in antitrust lawsuits; in fact, this Court itself has considered the scope of the immunity twice in just the past five years, first in *Phoebe Putney* and then in *North Carolina State Board*.

Although the United States argued below against immediate appealability—predictably so, given its role as a frequent antitrust plaintiff—it acknowledged that "whether denial of a motion to dismiss an antitrust claim under the state action doctrine is immediately appealable as a collateral order" is "a significant issue." Mot. to Participate in Oral Arg. (Dkt. 72) at 2 (July 1, 2016). Indeed, the government's decision to file an unsolicited amicus brief in the court of appeals itself reflects the importance of the issue. *See* U.S. Attorneys' Manual §2-2.123 (requiring authorization from the Solicitor General before any amicus brief can be filed). Nor is this the first case in which the government has participated as amicus curiae on the question presented. *See* U.S. Br. 5-22, *Auraria*, No. 11-1569, 2012 WL 1387342 (10th Cir. Jan. 4, 2013).

Litigants need a clear answer to that question, and the courts of appeals have been unable to provide one. Procedural uniformity across the circuits is desirable in any context, and especially in the context of antitrust law, which often generates litigation with high financial stakes for the litigants and the national economy. *See, e.g.*, *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 156 (1972) (recognizing "the importance of uniform interpretation of the antitrust law"). Those interests are magnified here by the sovereignty interests at stake. This Court can and should supply the needed clarity.

B. This Case Is A Good Vehicle

This case provides a good vehicle to answer the question presented. The Ninth Circuit addressed the question in a lengthy published opinion that acknowledged and responded to the decisions of other circuits. The court found it necessary to address only one of the three prerequisites for immediate appealability, but all three were fully briefed below and hence could be addressed by this Court if necessary. *See, e.g., Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) ("Any issue 'pressed or passed upon below' by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari[.]" (citation omitted)). Those issues have also been addressed by other courts of appeals, so this Court would have the benefit of reasoned judicial review. *See South Carolina State Board*, 455 F.3d at 442; *Martin*, 86 F.3d at 1396-1397; *Commuter Transportation*, 801 F.2d at 1290; *Huron Valley*, 792 F.2d at 567.

Resolution of the question presented, moreover, will conclusively determine whether the District is required to endure the burdens of litigation from which it claims immunity before having a definitive adjudication of its claim to immunity. That is obviously true as to the federal claims against the District, as the Ninth Circuit offered no alternative ground for its holding that the District could not appeal. And it is equally true as to the state-law antitrust claims, because Arizona antitrust law incorporates the doctrine of state-action immunity. *See Mothershed* v. *Justices of the Supreme Court*, 410 F.3d 602, 609 (9th Cir. 2005).

In opposing the District's motion to stay the Ninth Circuit's mandate, SolarCity argued (at 7-9) that a reversal here might *not* affect its state-law antitrust

claim, because on remand the Ninth Circuit might abandon *Mothershed* and conclude that Arizona law does not incorporate state-action immunity. Those speculative arguments lacked merit (as the District's reply explained), but at any rate they are irrelevant to whether certiorari should be granted. Even if SolarCity were correct, that would in no way prevent this Court from answering the question presented, nor would it mean that a reversal of the decision below would have no effect on the litigation.

Lastly, although proceedings in the district court have resumed in the wake of the Ninth Circuit's refusal to stay the issuance of its mandate, the question presented will not become moot in this case by virtue of the entry of final judgment. As an initial matter, the appealability of an interlocutory order falls within a well-recognized exception to mootness: It is a controversy capable of repetition, yet evading review. *See Kingdomware Technologies, Inc.* v. *United States*, 136 S. Ct. 1969, 1975-1976 (2016) (applying exception); *Texaco, Inc.* v. *Department of Energy*, 663 F.2d 158, 164 (D.C. Cir. 1980) (applying exception to an issue of appealability). The District (and other public utilities) will unquestionably engage in ratemaking again in the future, and anyone feeling aggrieved by such ratemaking would—emboldened by the district court's denial of state-action immunity here—be capable of following SolarCity's lead by seeking to make a federal case out of it. In any event, with trial set for April 17, 2018, it is unlikely (unless the district court grants summary judgment) that a final judgment will be entered before this Court disposes of the petition. And if the Court grants certiorari, the District will ask the district court—and, if necessary, the Ninth Circuit or this Court—to stay proceedings so as to eliminate any con-

ceivable doubt about this Court's jurisdiction to decide the question presented. Alternatively, this Court could enter a stay of district-court proceedings concurrently with any grant of certiorari.

III. THE DECISION BELOW IS WRONG

Finally, certiorari is warranted here because the Ninth Circuit's decision is incorrect.

A. Orders Denying State-Action Immunity Are Effectively Unreviewable On Appeal From A Final Judgment

1. Contrary to the court of appeals' holding, a denial of state-action immunity is not effectively reviewable on appeal from a final judgment—for reasons similar to those that led this Court to hold that denials of both state sovereign immunity and qualified immunity are immediately appealable.

A denial of state-action immunity, like a denial of state sovereign immunity, offends state sovereignty, dignity, and autonomy. Indeed, when this Court recognized state-action immunity in *Parker*, it did so on the ground that "[i]n a dual system of government in which ... the states are sovereign, ... an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351. The Court has repeatedly reiterated that sovereignty is a basis of state-action immunity. Most recently, the Court in *North Carolina State Board* explained that *Parker* "recognized Congress' purpose to respect the federal balance and to 'embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution.'" 135 S. Ct. at 1110 (quoting *Community Communications*, 455 U.S. at 53); *see also City of Lafayette*,

435 U.S. at 400 (citing *Parker*, 317 U.S. at 351). The Court also observed that "[i]f every ... state law or policy were required to conform to ... the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate." *North Carolina State Board*, 135 S. Ct. at 1109. In other words, the Court has recognized that a state should not have its prerogative to enlist political subdivisions in regulating its economy within its borders infringed by the possibility that such subdivisions could be sued for violating antitrust law.

State sovereign immunity is undoubtedly an immunity from suit, and hence the Court has recognized that a denial of that immunity is immediately appealable. *See Puerto Rico Aqueduct*, 506 U.S. at 143-144. Otherwise, the Court explained, "the States' dignitary interests" could not be "fully vindicated." *Id.* at 146. It would make little sense to treat state-action immunity, predicated on state sovereign immunity, with any less respect for federalism. *See, e.g.*, *Martin*, 86 F.3d at 1395-1396; Areeda & Hovenkamp, *Fundamentals of Antitrust Law* §2.04[B], at 2-51 (4th ed. & 2015 Supp.) (state-action doctrine is "designed to be an immunity, not merely a defense that can be offered at trial").

The court of appeals misunderstood this point, dismissing it as an argument that denials of state-action immunity are appealable simply "because that immunity has constitutional origins." App. 11a-12a. But that is not the District's argument; indeed, the District expressly disavowed the argument before the Ninth Circuit, stating that "the District has never argued ... that any constitutional ruling is immediately appealable." Pet'r C.A. Reply Br. 27. It is certainly true, as the

Ninth Circuit observed, that not *all* defenses derived from the Constitution permit an immediate appeal. *Id.* But that is because not all such defenses are immunities from suit rather than defenses against liability. The reason it matters that state-action immunity derives from state sovereignty is not that state sovereign immunity is constitutional in origin; it is that state sovereign immunity is an immunity from suit. By extension, so is state-action immunity.

State-action immunity is likewise similar to qualified immunity: Both seek to ensure that state and local officials exercise their discretion in the manner that best promotes the public interest, rather than the manner that minimizes their likelihood of being sued. As this Court has explained in the qualified-immunity context, "the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 (1982). That is equally true of state-action immunity, which serves "to avoid needless waste of public time and money" by ensuring that officials do not "avoid decisions involving antitrust laws which would expose [them] to costly litigation and conclusory allegations." *Commuter Transportation*, 801 F.2d at 1289. As the leading antitrust treatise elaborates, "[t]he importance of *Parker*'s status as an immunity is particularly strong when the defendant is a government agency [or] subdivision," because it would be harmful for "[s]uch entities" to "be intimidated from carrying out their regulatory obligations by threats of costly litigation, even if they might ultimately win." Areeda & Hovenkamp §2.04[B], at 2-52.

The Ninth Circuit misunderstood this argument as well, characterizing it as seeking to avoid "mere distraction or inconvenience to the ... District." App. 12a-13a.

If "inconvenience" were the only value at stake, there would indeed be no basis for an immediate appeal. This Court made that clear in *Will*, on which the Ninth Circuit relied heavily. But the argument is actually about preserving state and local officials' ability to set economic policy without having to worry about being subjected to the prolonged burdens of baseless litigation—a particularly significant issue in antitrust litigation, where "proceeding to ... discovery can be expensive," *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 558 (2007); *accord Manual for Complex Litigation, Fourth* §30 p.519 (2004) (describing extensive scope of discovery in antitrust cases).

Had the court of appeals applied *Will* correctly, it would have followed the Court's admonition there to examine "the value of the interests that would be lost through rigorous application of a final judgment requirement." 546 U.S. at 351-352; *see also Lauro Lines*, 490 U.S. at 502 (Scalia, J., concurring) ("The importance of the right asserted has always been a significant part of our collateral order doctrine."). And had the court of appeals done that, it would have seen the clear difference between the "value[s]" at stake in that case and this one. In *Will*, where customs officials sought to dismiss a suit under the judgment bar of the Federal Tort Claims Act, the Court explained that there really *was* nothing more than inconvenience at stake. 546 U.S. at 353-355. Not so here, where the cost of denying an immediate appeal would be to impair economic policymaking by state and local governments.[7]

---

[7] The similarities between state-action immunity on the one hand, and sovereign and qualified immunity on the other, also show the flaw in the Ninth Circuit's attempt to analogize state-action immunity to both *Noerr-Pennington* immunity and a de-

The Ninth Circuit (echoing *South Carolina State Board*) also based its denial of immediate appealability on the fact that state-action immunity can be invoked in some circumstances where sovereign immunity and qualified immunity cannot. *See* App. 14a-15a. But like the Fourth Circuit, the Ninth Circuit did not explain why such differences in the substantive scope of immunities should bear on the availability of collateral-order review. The two concepts are distinct, and the Ninth Circuit (again like the Fourth Circuit) cited no decision of this Court that based the availability or unavailability of collateral-order review on the substantive reach of the underlying defense.

Disputing this, SolarCity argued below (Stay Opp. 15-16) that *Will* did rest on differences among the underlying immunities. But the comparisons that *Will* made concerned the immunities' importance, which is part of the effective-unreviewability standard. *See* 546 U.S. at 352-353. By contrast, the "incongruities" among immunities that the Ninth Circuit invoked, App. 14a-15a, had no connection to the collateral-review standard.

Put simply, the decision below threatens the dignity and autonomy of the states, as well as the division of regulatory power between the state and federal governments, by allowing a political subdivision of a state to be subjected to prolonged litigation for engaging in conduct that was clearly authorized by the state. State-action immunity is of course not a free pass to evade antitrust liability; if a particular policy is not actually authorized by the relevant state, then a claim

---

fense of statutory preemption. App. 10a. Neither of those doctrines implicates the same concerns and values as sovereign immunity or qualified immunity (let alone both).

may proceed. But states and their subdivisions are entitled to have that determination reviewed by a court of appeals promptly, rather than being forced to endure months or years of burdensome and intrusive litigation as a result of an erroneous district court ruling.

2. Below, SolarCity and the government ventured a number of responses to the foregoing points about why denials of state-action immunity are immediately appealable. None of those responses has merit.

For example, in response to the District's point that state-action immunity has its roots in sovereign immunity, the government attempted (Br. 23-24) to distinguish sovereign immunity from state sovereignty, arguing that even if state-action immunity has roots in the latter, that does not mean it has any connection to the former. But the entire basis for sovereign immunity is (as the name suggests) states' status as sovereigns. In fact, this Court has explained that "immunity from private suits [is] central to sovereign dignity." *Alden* v. *Maine*, 527 U.S. 706, 715 (1999); *see also id.* at 756 ("fear of private suits against nonconsenting States was the central reason" for "preserv[ing] the States' sovereign immunity"). Moreover, there is no question that *Parker* held states *immune* for any violations of the Sherman Act. It is untenable to assert that this holding involved state sovereignty but not sovereign immunity.

SolarCity also argued below (Stay Opp. 15) that states do not need state-action immunity to protect themselves because they can invoke sovereign immunity—a point the court of appeals also embraced, App. 13a n.5. But political subdivisions cannot invoke sovereign immunity—and as discussed, denying them prompt resolution of a state-action immunity defense

impairs states' autonomy by infringing states' ability to choose to regulate their economies indirectly, by enlisting political subdivisions, rather than directly.

Finally, the government contended below (Br. 16-17) that immediate appeals are unnecessary here because erroneous denials of state-action immunity can be remedied after final judgment, or via §1292(b) certification or mandamus. (The Ninth Circuit embraced this point as well. App. 13a n.5.) But the same could be said of denials of sovereign immunity or qualified immunity, or rulings on other issues that indisputably satisfy the collateral-order doctrine. These points do nothing to support the claim that denials of state-action immunity are not immediately appealable.

B. Denials Of State-Action Immunity On Legal Grounds Conclusively Resolve An Important Issue Separate From The Merits

In addition to being effectively unreviewable on appeal from a final judgment, an interlocutory order must satisfy two requirements to be immediately appealable: It must be "conclusive" and "resolve important questions separate from the merits," *Swint*, 514 U.S. at 42. Denials of state-action immunity to public entities that, as here, turn on a question of law satisfy those requirements as well.

1. An interlocutory order is conclusive when it is a "fully consummated decision[]"—i.e., one that is not "tentative, informal, or incomplete." *Cohen*, 337 U.S. at 546. A denial of state-action immunity satisfies this requirement, because such "denials ... clearly purport to be conclusive determinations that [a state entity] ha[s] no right not to be sued under federal antitrust laws." *Martin*, 86 F.3d at 1396-1397. The conclusiveness of a

denial of state-action immunity is confirmed by the fact that entitlement to the immunity—certainly when it turns, as here, on the clear-articulation prong—is a question of law. The government did not dispute conclusiveness below, and even the Fourth Circuit, though concluding that other requirements of the collateral-order doctrine are not satisfied in these circumstances, said there "is no dispute" that the denial of state-action immunity satisfies the conclusiveness requirement. *South Carolina State Board*, 455 F.3d at 441. SolarCity has never cited any case holding to the contrary.

What SolarCity argued instead (Stay Opp. 13) was that conclusiveness is a subjective standard, turning on the "expectation" of the particular judge who issued the ruling in question. But the case from which SolarCity drew the term "expectation" shows that the standard is objective; the Court there described the relevant question as whether "a district court *ordinarily* would expect to reassess and revise [the] ... order" at issue. *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 277 (1988) (emphasis added). That standard makes sense, because whether a political subdivision has to wait for an appellate ruling on its asserted immunity should not turn on the fortuity of a particular district judge's views on whether he or she might revisit a prior order.

2. State-action immunity is also important—as discussed, it implicates questions of state autonomy and sovereignty—as well as separate from the merits of the underlying antitrust claims. And as to separateness, the Fifth Circuit explained that:

> An appellate court reviewing the denial of the state or state entity's claim of immunity need not consider the correctness of the plaintiff's

> version of the facts, nor even determine whether the plaintiff's allegations actually state a claim.... [A]ll it need determine is a question of law: whether the state entity acted pursuant to a clearly articulated and affirmatively expressed state policy.

Martin, 86 F.3d at 1397; *see also Shames* v. *California Travel & Tourism Commission*, 626 F.3d 1079, 1082 (9th Cir. 2010) (stating that in order to resolve whether an "agency's alleged conduct qualifies for 'state action immunity,'" a court "need not consider the legality of the alleged [anticompetitive] conduct"); *South Carolina State Board*, 455 F.3d at 447-448 (Traxler, J., concurring in part and concurring in the judgment) ("In my view, ... whether the actor represents the state is separate and severable from ... whether the action taken is unlawful."). In fact, the Fifth Circuit concluded that the denial of state action immunity "easily" met the separateness requirement. *Martin*, 86 F.3d at 1397.

This Court's precedent confirms the Fifth Circuit's explanation of why state-action immunity is separate from the merits of an antitrust claim. In *Phoebe Putney*, for example, this Court addressed whether Georgia had a clearly articulated policy allowing hospitals to make acquisitions that substantially lessened competition. *See* 568 U.S. at 219-220. And the Court's analysis did not look to the hospital's alleged anticompetitive conduct (beyond reciting what that alleged conduct was, which this Court has made clear is not enough to defeat separateness, *see Mitchell*, 472 U.S. at 528-529). Instead, the Court parsed various provisions of state law. *See Phoebe Putney*, 568 U.S. at 227-228; *accord, e.g.*, *Southern Motor Carriers Rate Conference* v. *United States*, 471 U.S. 48, 63 (1985) (finding clear articulation based solely on a review of state statutes). Here,

the District's claim to immunity likewise turns not on whether its conduct violated the antitrust laws but on whether the alleged anticompetitive conduct flowed from Arizona's clearly articulated policy to displace competition with regulation—a question that involves an analysis of Arizona's statutory and regulatory landscape divorced from the merits of SolarCity's claims.

To be sure, where a claim of state-action immunity turns on factual questions, the requisite separateness may not be present. If, for example, immunity depends on whether state officials are providing "active supervision" to an entity that—unlike the District—requires supervision in order to be immune, then separateness might be lacking. But that does not preclude collateral-order review in a case that, like this one, turns on a purely legal question (clear articulation).

SolarCity and the government contended otherwise below, asserting that the relevant class of orders (which is what courts consider when addressing immediate appealability, *see supra* p.5) is "*all* orders denying motions to dismiss on state-action grounds." SolarCity Br. 23 n.7 (emphasis added); *accord* U.S. Br. 19. But *Mitchell* makes clear that that framing is incorrect. The Court there held that the relevant class of orders was denials of qualified immunity that "turn[] on an issue of law." 472 U.S. at 530. If SolarCity's and the government's framing were correct, the Court in *Mitchell* would have defined the relevant class of qualified-immunity denials as "all orders denying motions to dismiss on [qualified-immunity] grounds." Consistent with *Mitchell*, the relevant class of orders in this context is denials of state-action immunity to public entities that turn on a question of law. Such orders resolve important legal questions separate from the underlying merits.

In short, orders denying state-action immunity to public entities on legal grounds satisfy all three requirements for collateral-order appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHRISTOPHER E. BABBITT
DANIEL S. VOLCHOK
DAVID GRINGER
DANIEL WINIK
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

MOLLY S. BOAST
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
molly.boast@wilmerhale.com

CHRISTOPHER T. CASAMASSIMA
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 S. Grand Avenue
Los Angeles, CA 90071
(213) 443-5300

SEPTEMBER 2017

APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOLARCITY CORPORATION,
Plaintiff-Appellee,

v.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Defendant-Appellant.

No. 15-17302
D.C. No. 2:15-cv-00374-DLR

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Argued and Submitted November 18, 2016
San Francisco, California

Filed June 12, 2017

Before: Alex Kozinski, Ronald Lee Gilman,* and Michelle T. Friedland, Circuit Judges.

Opinion by Judge Friedland

OPINION

FRIEDLAND, Circuit Judge:

---

* The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Solar-panel supplier SolarCity Corporation filed a federal antitrust lawsuit against the Salt River Project Agricultural Improvement and Power District (the Power District), alleging that the Power District had attempted to entrench its monopoly by setting prices that disfavored solar-power providers. The Power District moved to dismiss the complaint based on the state-action immunity doctrine. That doctrine insulates states, and in some instances their subdivisions, from federal antitrust liability when they regulate prices in a local industry or otherwise limit competition, as long as they are acting as states in doing so. *See, e.g., N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1109 (2015); *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1007 (2013); *Parker v. Brown*, 317 U.S. 341, 352 (1943).

The district court denied the motion, and the Power District appealed. We must decide whether we can consider the appeal immediately under the collateral-order doctrine, or whether any appeal based on state-action immunity must await final judgment.[1] We join the Fourth and Sixth Circuits in holding that the collateral-order doctrine does not allow an immediate appeal of an order denying a dismissal motion based on state-action immunity.

I

SolarCity sells and leases rooftop solar-energy panels. These solar panels allow its customers to reduce but not eliminate the amount of electricity they buy from other sources.

---

[1] We address two other issues in an unpublished memorandum filed with this opinion.

Many SolarCity customers and prospective customers live near Phoenix, Arizona, where the Power District is the only supplier of traditional electrical power. Allegedly to prevent SolarCity from installing more panels, the Power District changed its rates. Under the new pricing structure, any customer who obtains power from his own system must pay a prohibitively large penalty. As a result, SolarCity claims, solar panel retailers received ninety-six percent fewer applications for new solar-panel systems in the Power District's territory after the new rates took effect.

SolarCity filed a complaint in federal district court in Arizona. Among other claims, it alleged that the Power District had violated the Sherman and Clayton Acts because it had attempted to maintain a monopoly over the supply of electrical power in its territory.

The Power District is not only a supplier of power; it is also a political subdivision of Arizona. *See* Ariz. Rev. Stat. § 48-2302; *accord, e.g.*, *City of Mesa v. Salt River Project Agric. Improv. & Power Dist.*, 416 P.2d 187, 188–89 (Ariz. 1966) (summarizing the Power District's history and status); *Salt River Project Agric. Improv. & Power Dist. v. City of Phoenix*, 631 P.2d 553, 555 (Ariz. Ct. App. 1981) (same). It moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing, among other things, that it has authority to set prices under Arizona law and so is immune from federal antitrust lawsuits. The district court denied the motion, citing uncertainties about the specifics of the Power District's state-law authority and business. The district court also decided not to certify an interlocutory appeal, but the Power District appealed nonetheless.

II

Federal circuit courts have jurisdiction over appeals from "final decisions" of district courts. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009) (quoting 28 U.S.C. § 1291). "A 'final decision' is typically one 'by which a district court disassociates itself from a case.'" *Id.* at 106 (alteration omitted) (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 42 (1995)). If non-final decisions were generally appealable, cases could be interrupted and trials postponed indefinitely as enterprising appellants bounced matters between the district and appellate courts. *Bank of Columbia v. Sweeny*, 26 U.S. (1. Pet.) 567, 569 (1828); *Alaska v. United States*, 64 F.3d 1352, 1357–58 & n.9 (9th Cir. 1995). Costs would be inflated by such a multiplication of proceedings, *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981), and district courts would be inhibited in their ability to manage litigation efficiently, *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985). Moreover, "piecemeal appeals would undermine the independence of the district judge." *Firestone*, 449 U.S. at 374.

In limited circumstances, however, appeals may be allowed before a final judgment. For example, a district court may certify an order for an immediate appeal. *See* 28 U.S.C. § 1292(b). Alternately, some statutes and rules allow an early appeal of decisions on certain specific issues.[2] Relief from a court order may also

---

[2] *See, e.g.*, 28 U.S.C. § 1292(a) (giving circuit courts jurisdiction to hear appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions"; "appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property"; and "determining the rights and liabilities of the parties

be obtained in extraordinary circumstances through a writ of mandamus. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004). Or, as the Power District argues is true here, a piece of the case may become effectively "final" under the collateral-order doctrine, even though the case as a whole has not ended. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

The collateral-order doctrine has three requirements. First, an interlocutory order can be appealed only if it is "conclusive." *See Mohawk Indus.*, 558 U.S. at 106 (quoting *Swint*, 514 U.S. at 42). Second, the order must address a question that is "separate from the merits" of the underlying case. *Id.* Third, the separate question must raise "some particular value of a high order" and evade effective review if not considered immediately. *Will v. Hallock*, 546 U.S. 345, 351–53 (2006); *see also Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 878–79 (1994). All three requirements must be satisfied for the ruling to be immediately appealable. *McElmurry v. U.S. Bank Nat'l Ass'n*, 495 F.3d 1136, 1140 (9th Cir. 2007).

The Supreme Court has repeatedly emphasized that these requirements are stringent and that the collateral-order doctrine must remain a narrow exception. *See, e.g., Mohawk Indus.*, 558 U.S. at 106; *Will*, 546 U.S. at 349–50; *Dig. Equip.*, 511 U.S. at 868. In addition, the Court has held that in evaluating these three requirements, we must consider "the entire category to which a claim belongs." *Dig. Equip.*, 511 U.S. at 868. "As long as the class of claims, taken as a whole, can be ade-

---

to admiralty cases in which appeals from final decrees are allowed"); *id.* § 2072(c) (giving the Supreme Court power to prescribe rules defining "when a ruling of a district court is final"); Fed. R. Civ. P. 23(f) (permitting courts of appeals to hear appeals from orders granting or denying class certification).

quately vindicated by other means, 'the chance that the litigation at hand might be speeded, or a particular injustice averted,' does not provide a basis for jurisdiction under § 1291." *Mohawk Indus.*, 558 U.S. at 107 (alterations omitted) (quoting *Dig. Equip.*, 511 U.S. at 868).

III

The Power District argues that an interlocutory order denying state-action immunity is immediately appealable under the collateral-order doctrine. We begin our analysis by summarizing the state-action immunity doctrine, so as to provide context for our evaluation of the Power District's argument.

State-action immunity was first recognized in *Parker v. Brown*, 317 U.S. 341 (1943). In *Parker*, a California raisin producer alleged that a state commission that set supra-competitive raisin prices had violated federal antitrust law. *Id.* at 346–49. The Supreme Court assumed the state's price program would violate federal antitrust law if it were privately operated. *Id.* at 350. It also assumed that Congress could have prohibited California from setting such prices. *Id.* But because the commission "derived its authority ... from the legislative command of the state" and "nothing in the language of the Sherman Act or in its history ... suggest[ed] that its purpose was to restrain a state ... from activities directed by its legislature," the Court held that the commission's price-setting did not violate antitrust law. *Id.* at 350–51. As the Court explained, "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its

officers and agents is not lightly to be attributed to Congress." *Id.* at 351.

The Supreme Court's more recent state-action immunity cases likewise emphasize that the doctrine protects "the States' coordinate role in government," which "counsels against reading the federal antitrust laws to restrict the States' sovereign capacity to regulate their economies and provide services to their citizens." *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1016 (2013). The doctrine also protects local governmental entities if they act "pursuant to a clearly articulated and affirmatively expressed state policy to displace competition." *Id.* at 1007.

IV

We have not previously addressed whether an interlocutory order denying state-action immunity is immediately appealable under the collateral-order doctrine, nor has the Supreme Court. We now take on this question, mindful of the Supreme Court's admonition that the collateral-order doctrine is a "narrow exception," *Firestone*, 449 U.S. at 374, that must be "strictly applied," *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985).

A

The collateral-order doctrine allows interlocutory appeals in only a "limited category of cases." *Flanagan v. United States*, 465 U.S. 259, 265 (1984) (quoting *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (per curiam)). That category includes interlocutory denials of certain particularly important immunities from suit. The Supreme Court has allowed immediate appeals from denials of Eleventh Amendment immunity, *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*,

506 U.S. 139, 144 (1993), absolute immunity, *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982), and qualified immunity, *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985). We have also permitted such appeals from denials of foreign sovereign immunity, *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1130 (9th Cir. 2012), and tribal sovereign immunity, *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1089–91 (9th Cir. 2007).

The Power District argues that the state-action doctrine is akin to those immunities and thus that the rejection of such a defense should also be immediately appealable. But those immunities are immunities from suit, which differ from mere immunities from liability. *See Nunag-Tanedo v. E. Baton Rouge Par. Sch. Bd.*, 711 F.3d 1136, 1139–40 (9th Cir. 2013); *see also United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 269 (1982) (explaining the "crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges"). Unlike immunity from suit, immunity from liability can be protected by a post-judgment appeal. *Nunag-Tanedo*, 711 F.3d at 1139–40. Denials of immunity from liability therefore do not meet the requirements for immediate appeal under the collateral-order doctrine. *Id.* Accordingly, we must consider whether the state-action immunity doctrine provides immunity from suit or immunity from liability.

The Supreme Court has cautioned against broad assertions of immunity from suit and has instructed us to "view claims of a right not to be tried with skepticism, if not a jaundiced eye." *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994) (internal quotation marks omitted). Reading *Parker* with appropriate skepticism toward the Power District's claim of immunity from suit shows that the state-action doctrine is a defense to liability, not immunity from suit.

The Supreme Court assumed in *Parker* that Congress could have blocked the challenged California price regulation, but the Court found no evidence in the Sherman Act that Congress actually intended to block the regulation or other similar state laws. *Parker v. Brown*, 317 U.S. 341, 350–51 (1943). *Parker* thus recognizes a limit on liability under the Sherman Act rather than a safeguard of state sovereign immunity. Consistent with that reading of *Parker*, we and the Supreme Court have described state-action immunity as an immunity from liability. *Patrick v. Burget*, 486 U.S. 94, 95 (1988) ("The question presented in this case is whether the state-action doctrine ... protects physicians in the State of Oregon from federal antitrust liability."); *Snake River Valley Elec. Ass'n v. PacifiCorp*, 357 F.3d 1042, 1044 (9th Cir. 2004) ("[W]e again assess the scope of state action immunity from liability under federal antitrust law.").

A denial of a motion to dismiss based on state-action immunity is thus no different from other denials of dismissal under Federal Rule of Civil Procedure 12(b)(6). When a defendant is sued under a statute that he believes was never meant to apply to him, he may move to dismiss for failure to state a claim on which relief can be granted. His motion would then be granted if the court could not reasonably infer his liability under that statute. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Orders denying motions to dismiss on such grounds cannot ordinarily be appealed immediately. *See, e.g., Alaska v. United States*, 64 F.3d 1352, 1357 (9th Cir. 1995) (explaining why an interlocutory appeal is not justified to ascertain "whether the plaintiff's claim falls within the language of a statute or common law cause of action"). We are not persuaded that a mo-

tion based on state-action immunity should be treated differently.

In this sense, state-action immunity is analogous to so-called "*Noerr–Pennington* immunity." Grounded in the First Amendment, that doctrine insulates defendants from antitrust liability for petitioning the government. *See, e.g., Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1757 (2014); *see also Nunag-Tanedo*, 711 F.3d at 1138–40. We have held that *Noerr–Pennington* immunity is not an immunity from suit but rather an immunity from liability. *Nunag-Tanedo*, 711 F.3d at 1140. It is a "principle of statutory interpretation" and "no more a protection from litigation itself than is any other ordinary defense." *Id.* Accordingly, we have held that decisions about *Noerr–Pennington* immunity are not immediately appealable. *Id.* at 1141.

Similar reasoning has led us to hold that defendants cannot immediately appeal an order rejecting their reliance on statutory preemption. *See Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1189–90 (9th Cir. 2003) (per curiam). In *Miranda B.*, the defendants had unsuccessfully moved to dismiss a 42 U.S.C. § 1983 suit, arguing that a § 1983 remedy was precluded by other statutory remedies. *See id.* at 1190. We determined that we had no jurisdiction over their immediate appeal, because the defendants were merely asserting a defense to liability, not an immunity from suit. *Id.* ("The 'essence' of the [defendants'] argument is thus not immunity from suit or a right not to stand trial, but a defense to suit."). The same is true here.

In sum, because the state-action doctrine is a defense to liability and not an immunity from suit,[3] the collateral-order doctrine does not give us jurisdiction here.[4] *Nunag-Tanedo*, 711 F.3d at 1139–40.

B

The Power District's two primary counterarguments are unavailing.

First, the Power District argues that the collateral-order doctrine embraces interlocutory orders denying assertions of state-action immunity because that immunity has constitutional origins. To be sure, *Parker* depended on California's constitutionally protected sovereign status. *See* 317 U.S. at 351 (emphasizing the "dual system of government in which, under the Constitution, the states are sovereign"). But a defense's constitutional pedigree does not necessarily confer the right to an immediate appeal. As noted above, a claim of *Noerr-Pennington* immunity—a defense derived

---

[3] Even if the state-action doctrine could be characterized as an immunity from suit, interlocutory denials of that defense still might not be immediately appealable under the collateral-order doctrine. *See Will v. Hallock*, 546 U.S. 345, 353 (2006) ("[I]t is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later.").

[4] Because we hold that an interlocutory appeal is not necessary to guarantee meaningful appellate review of an order denying state-action immunity, we need not decide whether the district court's order was conclusive and collateral (the two other requirements for immediate appealability under the collateral-order doctrine). *See McElmurry v. U.S. Bank Nat'l Ass'n*, 495 F.3d 1136, 1140 (9th Cir. 2007) ("Because collateral jurisdiction requires all three elements, we lack collateral order jurisdiction if even one is not met.").

from the First Amendment—does not entitle one to an immediate appeal under the collateral-order doctrine. *Nunag-Tanedo*, 711 F.3d at 1141. And a criminal defendant is not entitled to an immediate appeal after his attorney is removed, even though he has a constitutional right to counsel of his choice. *See Flanagan*, 465 U.S. at 266–68. Constitutional provenance therefore does not ensure the availability of an immediate appeal. *See id.* at 268–70; *Nunag-Tanedo*, 711 F.3d at 1140.

Second, the Power District argues that an immediate appeal is necessary to avoid litigation that would distract government officials. The Supreme Court rejected a similar argument in *Will v. Hallock*, 546 U.S. 345 (2006). In *Will*, the plaintiffs lost their business after customs agents destroyed data stored in their computers. *Id.* at 348. They sued the United States under the Federal Tort Claims Act (FTCA) and in a separate complaint sued the individual agents under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The district court dismissed the case against the United States under an exception in the FTCA. *See* 546 U.S. at 348 (citing 28 U.S.C. § 2680(e)). The agents then moved to dismiss the *Bivens* case, citing the "judgment bar" in 28 U.S.C. § 2676, which essentially prohibits unsuccessful FTCA plaintiffs from suing again for the same events. The district court denied the agents' motion to dismiss the *Bivens* case, holding that its dismissal of the action against the United States did not trigger the judgment bar. *Will*, 546 U.S. at 348–49.

The Supreme Court held that the agents could not appeal immediately, rejecting the argument that immediate review was necessary to prevent distraction to the government. *See id.* at 353. The Court acknowledged "that if the Bivens action goes to trial the efficiency of Government will be compromised and the officials bur-

dened and distracted, as in ... qualified immunity case[s]." *Id.* But despite this similarity to qualified immunity cases, the Court reasoned that "[q]ualified immunity is not the law simply to save trouble for the Government and its employees." *Id.* Rather, state officials enjoy qualified immunity "because the burden of trial is unjustified in the face of a colorable claim that the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was." *Id.* The Court held that the same could not be said of the judgment bar, which is simply designed to "avoid[] ... litigation for its own sake." *Id.* If the avoidance of litigation alone sufficed as justification for an interlocutory appeal, then "28 U.S.C. § 1291 would fade out whenever the Government or an official lost an early round that could have stopped the fight." *Id.* at 354. The collateral-order doctrine thus did not confer jurisdiction over the agents' appeal. *See id.* at 355. Likewise, the possibility of mere distraction or inconvenience to the Power District does not give us jurisdiction here.[5]

---

[5] Of course, our holding here does not prevent states from taking advantage of other avenues for immediate review. In appropriate antitrust cases, states may assert Eleventh Amendment immunity, individual officials may assert qualified immunity, or district courts may grant early-case motions to dismiss or certify appeals under § 1292(b). As a last resort, a defendant may petition for a writ of mandamus. *Cf. Cheney v. U.S. Dist. Court*, 542 U.S. 367, 381-82 (2004) (explaining that mandamus relief may be appropriate in a case that threatens the separation of powers, intrudes "on a delicate area of federal-state relations," or implicates an officer's ability to perform constitutional duties (quoting *Will v. United States*, 389 U.S. 90, 95 (1967))). Although such appeals might be possible in some circumstances, jurisdiction under the collateral-order doctrine does not turn on the existence of any subset of exceptional cases; rather, the collateral-order doctrine is evaluated with the "entire category" of orders in mind. *Mohawk*

C

Our conclusion that an order denying state-action immunity is not appealable under the collateral-order doctrine comports with decisions of the Fourth and Sixth Circuits.

In *Huron Valley Hospital, Inc. v. City of Pontiac*, 792 F.2d 563 (6th Cir. 1986), the Sixth Circuit held that unsuccessful assertions of state-action immunity failed the second and third parts of the collateral-order test. The court concluded that questions of state-action immunity could not be separated from the merits of the underlying antitrust claim itself. *Id.* at 567. It also held that state-action immunity is not an "'entitlement' of the same magnitude as qualified immunity or absolute immunity, but rather is more akin to a defense to the original claim." *Id.* Because the Supreme Court had allowed appeals from collateral orders "in very few situations," the Sixth Circuit declined to broaden the right to an immediate appeal to encompass assertions of state-action immunity. *Id.* at 568.

The Fourth Circuit agreed in *South Carolina State Board of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006). It similarly held that the second and third parts of the collateral-order test were not satisfied. *Id.* at 441–47; *see also id.* at 444 ("*Parker* construed a statute. It did not identify or articulate a constitutional or common law 'right not to be tried.'").

The Fourth Circuit also persuasively identified three specific incongruities between the state-action doctrine and immunities from suit that the Supreme Court has held fall within the collateral-order doctrine.

Indus., Inc. v. Carpenter, 558 U.S. 100, 107 (2009) (quoting *Dig. Equip.*, 511 U.S. at 868).

See 455 F.3d at 446–47. First, municipalities may invoke state-action immunity, but they may not rely on qualified or Eleventh Amendment immunity. *Id.* at 446 (citing, among other cases, *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 413 (1978), and *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989)). Second, the state-action doctrine bars "all antitrust actions, regardless of the relief sought," but qualified and sovereign immunities do not prevent suits for certain prospective relief. *Id.* at 446–47 (citing, among other cases, *Am. Fire, Theft & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991)). And third, an antitrust defendant can invoke state-action immunity even in a lawsuit by the United States. *Id.* at 447. *See, e.g., N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015) (addressing state-action immunity in a suit by the Federal Trade Commission); *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013) (same); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992) (same). By contrast, a state cannot rely on sovereign immunity to defend against such a lawsuit. *S.C. State Bd.*, 455 F.3d at 447 (citing *United States v. Mississippi*, 380 U.S. 128, 140–41 (1965)). Those discrepancies suggest that state-action immunity should not be treated the same as absolute, qualified, or Eleventh Amendment immunity.

We acknowledge that two circuits have reached the opposite conclusion. First, in *Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986), the Eleventh Circuit held that state-action immunity was comparable to qualified immunity because both doctrines protected officials from "costly litigation and conclusory allegations." *Id.* at 1289; *see also, e.g., Danner Constr. Co. v. Hillsborough County*, 608 F.3d 809, 812 n.1 (11th Cir.

2010); *Askew v. DCH Reg'l Health Care Auth.*, 995 F.2d 1033, 1036–37 (11th Cir. 1993).

Second, in *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996), the Fifth Circuit held that "state action immunity shares the essential element of absolute, qualified and Eleventh Amendment immunities—'an entitlement not to stand trial under certain circumstances.'" *Id.* at 1395 (quoting *Mitchell*, 472 U.S. at 525). The Fifth Circuit opined that state-action immunity protects states from the indignity of private lawsuits and spares state officials the threat and distraction of discovery and trials. *Id.* at 1395–96. It held that those interests—like the parallel protections afforded by qualified and absolute immunities—could be vindicated only if evaluated before trial.[6] *Id.*

In our view, the Fourth and Sixth Circuits' decisions are more persuasively and thoroughly reasoned. Neither *Martin* nor *Commuter Transportation Systems* meaningfully grappled with the Supreme Court's persistent emphasis that the collateral-order doctrine must remain narrow. *See Firestone*, 449 U.S. at 374; *Richardson-Merrell*, 472 U.S. at 431; *Flanagan*, 465 U.S. at 265–66; *Hollywood Motor Car Co.*, 458 U.S. at 265).

Our conclusion that the Fourth and Sixth Circuits have the better view is further bolstered by the Su-

---

[6] Two other circuits have cited *Martin and Commuter Transportation Systems* without endorsing their conclusions. *See Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC*, 703 F.3d 1147, 1150-51 (10th Cir. 2013) (noting circuit split on immediate appealability of *Parker* immunity claims but deciding the case without reaching the issue); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987) (citing *Commuter Transportation Systems*); *see also We, Inc. v. City of Philadelphia*, 174 F.3d 322, 329 (3d Cir. 1999) (citing *Segni's discussion of Commuter Transportation Systems*).

preme Court's more recent decisions. If anything, the Supreme Court's emphasis on the narrowness of the collateral-order doctrine has grown stronger since *Martin* and *Commuter Transportation Systems* were decided. *See, e.g.*, *Mohawk Indus.*, 558 U.S. at 106 (stressing the doctrine must "never be allowed to swallow the general rule" (quoting *Dig. Equip.*, 511 U.S. at 868)); *Will*, 546 U.S. at 349–50 ("emphasizing its modest scope"); *Cunningham v. Hamilton County*, 527 U.S. 198, 204 (1999) (referring to the "small category" of appealable non-final orders (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 42 (1995))); *Dig. Equip.*, 511 U.S. at 868 (labeling the doctrine's requirements "stringent"); *P.R. Aqueduct*, 506 U.S. at 143 (describing a "small class" of orders (quoting *Cohen*, 337 U.S. at 546)); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988) (referring to the "narrow circumstances" in which the rule applies). Moreover, in both *Martin* and *Commuter Transportation Systems*, an early appeal was deemed necessary to avoid the distraction of state officials. *See Martin*, 86 F.3d at 1396; *Commuter Transp.*, 801 F.2d at 1289. But, as explained above, the Supreme Court's more recent decision in *Will* held that governmental defendants may not rely solely on the distraction or indignity of a lawsuit to justify immediate appealability. *See* 546 U.S. at 353–55.

We therefore join the Fourth and Sixth Circuits in holding that defendants cannot invoke the collateral-order doctrine to immediately appeal the rejection of a state-action immunity defense.

V

For the foregoing reasons, the appeal is **DISMISSED** for lack of jurisdiction.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOLARCITY CORPORATION,
Plaintiff-Appellee,

v.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Defendant-Appellant.

No. 15-17302
D.C. No. 2:15-cv-00374-DLR

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Argued and Submitted November 18, 2016
San Francisco, California
Filed June 12, 2017

MEMORANDUM*

Before: KOZINSKI, GILMAN,** and FRIEDLAND, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

We lack jurisdiction to consider the Power District's arguments based on Arizona Revised Statutes section 12-820.01. That section establishes an immunity against claims for damages, but not against claims for injunctive relief. *AlliedSignal, Inc. v. City of Phoenix*, 182 F.3d 692, 697 (9th Cir. 1999) (citing *Zeigler v. Kirschner*, 781 P.2d 54, 61 (Ariz. Ct. App. 1989)). SolarCity's claims for antitrust damages were dismissed, and neither it nor the Power District has appealed that decision. SolarCity also abandoned its previously asserted claim for tort damages in favor of an earlier trial. Thus, section 12-820.01 can become relevant only after judgment is entered, if at all—for example, if SolarCity eventually appeals the district court's order dismissing its damages claims. The Power District's current appeal of the issue is thus not ripe.[1] *See, e.g.*, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (emphasizing that a collateral order can be appealed only if review would be ineffective after final judgment); *Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985))).

Lastly, as to the filed-rate doctrine, the Power District argues only that we have pendent jurisdiction to consider its appeal. We cannot have pendent jurisdiction without appellate jurisdiction over some other matter—which we lack for the reasons stated above and in our concurrently filed opinion.

DISMISSED.

---

[1] The Power District's motion for judicial notice is accordingly denied as moot.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SOLARCITY CORPORATION,

Plaintiff,

v.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, et al.

Defendants.

No. CV-15-00374-PHX-DLR
Filed December 21, 2015

ORDER

Before the Court are Defendant Salt River Agricultural Improvement and Power District's (the "District") Motion for Certification under 28 U.S.C. § 1292(b), (Doc. 82), and Motion to Stay, (Doc. 83). The motions are fully briefed, and neither party requested oral argument. For the reasons below, both motions are denied.

BACKGROUND

Plaintiff SolarCity Corporation, a manufacturer and distributor of solar panels, filed suit against the District and the Salt River Valley Water Users' Association (the "Association") alleging violations of federal and state antitrust laws. (Doc. 39.) SolarCity alleges that the District and the Association, operating as the Salt River Project ("SRP"), exercise monopoly power over the sale of retail electricity in the greater Phoenix-metro area. (*Id.*, ¶¶ 1-2.) It claims SRP imposed a

fee that makes it economically infeasible for customers to obtain some of their electricity from solar systems and that the fee has the effect of eliminating competition from SolarCity and other solar companies in the market. (*Id.*, ¶¶ 4, 13.)

The District and the Association both filed motions to dismiss, which raised several immunities based on the District's status as a political subdivision of the State of Arizona. (Docs. 52, 53.) On October 27, 2015, the Court dismissed the Association and several of SolarCity's antitrust claims. (Doc. 77.) It also found that the Local Government Antitrust Act ("LGAA") barred SolarCity's claims for damages under federal antitrust law because the District is a political subdivision of Arizona, but denied the District's motion with respect to the remaining immunity defenses. (*Id.* at 22-26.) SolarCity's claims for equitable relief under § 2 of the Sherman Act (monopolization and attempted monopolization) and damages claims under state antitrust and tort law survived. The District now moves for the Court to certify three issues for interlocutory appeal pursuant to 28 U.S.C. § 1292(b): (1) whether it is immune from all remaining claims under the state action doctrine, (2) whether it is immune from all damages claims under Arizona Revised Statute ("A.R.S.") § 12-820.01, and (3) whether it immune from all remaining claims under the filed-rate doctrine. (Doc. 82.) The District also requests that the Court stay the case pending its appeal. (Doc. 83.)

LEGAL STANDARD

Under § 1292(b), the district court shall state in a non-appealable order if the court is of the "opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opin-

ion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation[.]" 28 U.S.C. § 1292(b). The "requirements of § 1292(b) are jurisdictional," and the procedure is a "narrow exception to the final judgment rule[.]" *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (internal quotations omitted). "The party seeking certification has the burden of showing that exceptional circumstances justify a departure from the 'basic rule of postponing appellate review until after the entry of a final judgment.'" *Fukuda v. L.A. Cty.*, 630 F. Supp. 228, 229 (C.D. Cal. 1986) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978)). "[A] party's strong disagreement with the Court's ruling is not sufficient for there to be a 'substantial ground for difference.' [In addition,] [t]hat settled law might be applied differently does not establish a substantial ground for difference of opinion." *Couch*, 611 F.3d at 633.

ANALYSIS

I. Motion for § 1292(b) Certification

The District argues that each immunity issue satisfies the requirements of § 1292(b). It claims that resolution of these issues would avoid the risk of piecemeal litigation and multiple appeals, which would lower the costs and burden for both the parties and the Court. (Doc. 82 at 2.) The Court disagrees.

A. State-Action Immunity

State-action immunity "exempts qualifying state and local government regulation from federal antitrust, even if the regulation at issue compels an otherwise clear violation of the federal antitrust laws." *Cost Mgmt. Servs. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 941 (9th Cir. 1996) (internal quotation marks omitted). The

doctrine originated in *Parker v. Brown*, 317 U.S. 341 (1943), in which the Supreme Court found that the "Sherman Act was not intended to apply to acts of the States 'as sovereigns.'" *Springs Ambulance Serv., Inc. v. City of Rancho Mirage, Cal.*, 745 F.2d 1270, 1272 (9th Cir. 1984). But "this state-action immunity does not apply automatically to the state's political subdivisions." *Id.* "As with private parties, immunity will only attach to the activities of local governmental entities if they are undertaken pursuant to a 'clearly articulated and affirmatively expressed' state policy to displace competition." *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1011 (2013). "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored[.]'" *Id.* at 1010 (quoting *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)).

The District argues that the question of state-action immunity is a controlling question of law because, if it applies, it bars all of SolarCity's antitrust claims.[1] An issue is "controlling" if its resolution on appeal "could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). Because equitable relief under the federal antitrust laws is the crux of SolarCity's case, the Court concludes that application of state-action immunity is a controlling question of law under § 1292(b). *See Springs Ambulance*, 745 F.2d at 1272 (granting permission for interlocutory appeal of district court's order denying state-action immunity on motion to dismiss after district court found that it is a controlling issue of law). However, the Court finds that the

[1] It would not bar SolarCity's remaining state law tort claims.

District has failed to demonstrate a substantial ground for difference of opinion on this issue.

In ruling on the motion to dismiss, the Court concluded that whether Arizona has articulated a clear policy permitting the District's conduct is a question of fact and noted that SolarCity had adequately alleged that Arizona has no such policy. (Doc. 77 at 25.) The District argues that the "clear articulation" prong is a question of law that the Court should have decided in its Order. The Court agrees with the District. "[T]he state-action immunity question is one of law that turns on whether the displacement of competition with monopolies in the [relevant] market was 'clearly articulated and affirmatively expressed as state policy.'" *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 111 F.3d 1427, 1442 (9th Cir. 1996).

However, correction of this error on appeal would not materially advance the ultimate termination of the litigation because there is no substantial ground for difference of opinion that the District's alleged conduct is not protected by state-action immunity. Had the Court decided the issue as a matter of law, it would have found that Arizona has not expressly articulated a clear policy authorizing the conduct of the District. *See Cost Mgmt.*, 99 F.3d at 942 ("the relevant question is whether the regulatory structure which has been adopted by the state has specifically authorized the conduct alleged to violate the Sherman Act"). In fact, the opposite is true. A.R.S. § 40-202(B), cited by SolarCity in its response to the District's motion to dismiss, provides that "[i]t is the public policy of this state that a competitive market shall exist in the sale of electric generation service." The District did not address this statute in its reply brief, even though, as the moving party, it had the burden of demonstrating that state-action immuni-

ty protects its conduct. In light of the statute, there are no substantial grounds for disagreement that Arizona has no clearly expressed and affirmative policy displacing competition in the retail electricity market.[2]

Nonetheless, the District argued that "Arizona's clearly articulated policy, which is expressed in the Arizona Constitution and statutes, has been to displace unfettered competition with an elaborate regulatory structure." (Doc. 53 at 10.) It claimed "[r]etail electric rates in Arizona are not determined by competition," and cited a litany of statutes and regulations pertaining to the Arizona Corporation Commission's ("ACC") authority to prescribe rates for public service corporations and the ratemaking process in general. (*Id.* at 10-11.); *see also* Ariz. Const. Art. 15 § 3 (mandating that the ACC "shall, prescribe just and reasonable rates and charges to be made and collected, by public service corporations"). In essence, the District argued that its conduct is a foreseeable result of Arizona's regulatory scheme pertaining to electricity rates because the retail electric market is heavily regulated, no other companies are certified to provide retail electricity, and electricity rates are set by the ACC, not the market. *See Hallie v. Eau Claire*, 471 U.S. 34, 43 (1985) (finding that state-action immunity applies if "anticompetitive effects logically would result from [the State's] authority to regulate").

At most, the District demonstrated that Arizona does not permit retail electricity rates to be determined in the open market. This is the function of the ACC. But

---

[2] The District presents no additional arguments on the merits of its state-action immunity defense. Instead, it only takes issue with the Court's finding that whether Arizona has a clearly expressed and articulated policy displacing competition in the retail electricity market was a question of fact.

the fact that electricity rates are heavily regulated does not mean that the District is free to act anticompetitively when setting its own prices for distribution of electricity, which incorporates those rates. *See Phoebe*, 133 S. Ct. at 1012 ("Our case law makes clear that state-law authority to act is insufficient to establish state-action immunity; the substate governmental entity must also show that it has been delegated authority to act or regulate anticompetitively."). Nor is the District's anticompetitive conduct a foreseeable result of fixed electricity rates. The District adheres to an administrative scheme when setting its "terms and conditions for customer selection, complaint resolution, consumer protection, stranded costs, distribution service rates and charges, system benefit charges and other related matters[.]" A.R.S. § 30-802(B). But this hardly indicates that the District is free to act anticompetitively. Rather, the purpose of the administrative process governing the District's prices is to "promote consistent statewide application of [the public power entities'] respective rules, procedures and orders." *Id.* § 3-802(A).

In summary, had the Court reached the issue as a matter of law, it would have concluded that Arizona does not have a clearly articulated policy to displace competition in the retail electricity market. The clearly articulated policy in Arizona *favors* competition. Although the Court erroneously concluded that application of state-action immunity presented questions of fact, correction of this error on appeal would not materially advance the ultimate termination of this case because, given the undisputed language of A.R.S. § 40-202(B), it is beyond substantial dispute that the District's alleged conduct is not protected by state-action immunity. Therefore, the Court declines to certify this issue for interlocutory appeal.

B. Absolute Immunity Under Arizona Law

A.R.S. § 12-820.01 provides "absolute immunity" for a public entity's "exercise of a judicial or legislative function." As a political subdivision of the state, the District is a "public entity" under Arizona law. *See* A.R.S. § 12-820(7) ("'Public entity' includes this state and any political subdivision of this state."). This immunity applies to damages only, not equitable relief. *See AlliedSignal, Inc. v. City of Phx.*, 182 F.3d 692, 697 (9th Cir. 1999) (citing *Zeigler v. Kirschner*, 781 P.2d 54, 61 (Ariz. Ct. App. 1989)). Because this issue turns on questions of fact and would only bar damages, not SolarCity's claims for equitable relief under the federal antitrust laws, it is not a controlling question of law. *See In re Cement Antitrust Litig.*, 673 F.2d at 1026.

In addition, there are no substantial grounds for difference of opinion regarding the Court's decision. The Court found that whether the District's alleged ratemaking ability is a legislative function is a question of fact. (Doc. 77 at 23.) The District argues this is a question of law. (Doc. 82 at 8.) Absolute immunity is generally a question of law for the court to decide; however, "[b]ecause absolute immunity is related to a defendant's status, usually there are limited factual determinations necessary to resolve the issue." *Link v. Pima Cty.*, 972 P.2d 669, 674 (Ariz. Ct. App. 1998) (internal citations omitted). "If an absolute immunity defense is raised and related factual issues exist, those issues should be resolved by the jury as in qualified immunity cases." *Id.*

The District labels its conduct as ratemaking, but there is no authority holding that the District's adoption of prices for sale of retail electricity is ratemaking, let alone that it is a legislative function. The cases cited by the District in its motion applied to the ACC's rate-

making ability, not the District's. *See Arizona Corp. Comm'n v. State ex rel. Woods*, 830 P.2d 807, 812 (Ariz. 1992) (noting ratemaking is a legislative power of the ACC); *Arizona Corp. Comm'n v. Superior Court*, 480 P.2d 988, 991 (Ariz. 1971) (same). The prices set by the District for its distribution of electricity are wholly separate from the ACC's process for setting the rate of a commodity sold by a public utility.

The District claims "it is the *substance* of the public function at issue that determines whether it is legislative in character and that if ratemaking is legislative in character for the ACC, it is legislative in character for the District as well." (Doc. 83 at 13.) But when ruling on a motion to dismiss, the Court is limited to the allegations in the complaint. Here, the allegations of the complaint do not allow the Court to make any determination about the District's price setting function, i.e., whether this function has the same features that make the ACC's rate setting functions legislative in character. Instead, SolarCity alleges that the District acts more like a private corporation because its Board approves the prices after it receives comment from interested parties, it is not subject to any regulation by any state agency with respect to determining its prices, it refused to release information about the process, and it never released a final decision stating the factual and legal bases for the prices. (Doc. 39, ¶¶ 42, 91-102.) Whether the District engages in ratemaking at all, let alone any legislative functions as a traditional branch of government, remains to be determined on a fully-developed factual record. The Court will not certify this issue for interlocutory appeal.

C. Filed-Rate Doctrine

The filed-rate doctrine "precludes interference with the rate setting authority of an administrative

agency[.]" *Wah Chang v. Duke Energy Trading & Mktg.*, 507 F.3d 1222, 1225 (9th Cir. 2007). Rates that are deemed reasonable by a regulatory agency are insulated from challenge. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).[3] Originally, the doctrine applied to rates reviewed and filed by federal agencies. *See id.* at 578. Several states have adopted the doctrine, *see Qwest Corp. v. Kelly*, 59 P.3d 789, 800 (Ariz. Ct. App. 2002) (listing cases), but Arizona has not, *see id.*; *see also Johnson v. First Am. Title Ins. Co.*, No. CV-08-01184-PHX-DGC, 2008 WL 4850198, at *4 (D. Ariz. 2008) (Arizona "has never adopted the filed-rate doctrine"). Here, the Court concluded that the doctrine did not apply because, even assuming the prices set by the District are "rates," "SolarCity does not challenge the District's electricity rates as unreasonable, but instead alleges the District imposed the rates to exclude it from the market." (Doc. 77 at 25.)

Assuming *arguendo* that this is a controlling question of law, there are no substantial grounds for difference of opinion regarding the Court's finding. The filedrate doctrine is one of deference for a regulatory agency's conclusion that a rate for some type of public good or service is reasonable. *See Hall*, 453 U.S. at 577. The purpose of the doctrine is to prevent "price discrimination among rate payers" and preserve "the role of regulatory agencies in deciding reasonable rates for public utilities and services." Qwest, 59 P.3d at 799. Federal courts "apply the filed rate doctrine out of deference to a 'congressional scheme of uniform ... regulation.' Otherwise [courts] would impermissibly 'usurp[ ]

---

[3] Although refined in *Hall*, the doctrine originated in *Keogh v. Chicago & Northwestern Railway, Co.*, 260 U.S. 156 (1922), and has been criticized and narrowed by the Ninth Circuit in *Cost Management*, 99 F.3d at 943-48.

a function that Congress has assigned to a federal regulatory body.'" *Cty. of Stanislaus v. Pac. Gas & Elec. Co.*, 114 F.3d 858, 862 (9th Cir. 1997) (quoting Hall, 453 U.S. at 579, 582) (internal citations omitted).

SolarCity does not challenge the reasonableness of any "filed rate" set by any regulatory agency. It does not claim the District's prices are too high, too low, or that they are artificially inflated to increase profit. Rather, they challenge the District's discriminatory pricing directed at restricting competition. The result would be the same had the District decided to refuse electric service to customers who purchase some of their electricity from SolarCity.

The District also conflates the *rate* for electricity, which is determined by the ACC, and the *prices* set by the District for distributing that electricity via the grid. The District does not claim to be a regulatory authority, it does not argue that Arizona grants it any authority to set uniform prices for distributing electricity, and it does not file the prices with any other governmental unit but itself.[4] No regulatory authority, such as the ACC, approved the District's electricity prices, and thus there is no reason to assume the prices are reasonable as a matter of law.[5]

---

[4] If, for instance, SolarCity filed suit challenging the rates for electricity set by the ACC, the doctrine would apply and bar the suit. *See Hall*, 453 U.S.

[5] The District argues that its Board approved the prices, and thus they are entitled to deference. But the District cannot self-police its own rates, especially given the Board is elected by its "shareholders," much like a for-profit corporation . (Doc. 39, ¶¶ 24, 25).

Furthermore, the doctrine does not bar antitrust suits by competitors alleging that "the rates which were adopted were adopted in part because of an antitrust violation on the part of the defendant." *Cost Mgmt.*, 99 F.3d at 947. The District argues SolarCity brings this action "in the shoes" of electric customers. (Doc. 99 at 11.) But the Court has concluded that SolarCity is a competitor of the District, and SolarCity alleges the District violated antitrust laws when it changed its pricing structure. The doctrine simply does not apply to this case, and the Court declines to certify this issue for interlocutory appeal.

D. Conclusion

The District has failed to establish exceptional circumstances that would justify immediate appeal of these issues. *See Livesay*, 437 U.S. at 475. The motion is denied.

II. Motion to Stay

The District requests that the Court stay this action pending resolution of its appeal on two issues: state-action immunity and absolute immunity under Arizona law. (Doc. 83.) The District appealed the Court's ruling on these issues on November 20, 2015. (Doc. 81.) It argues these two immunities are immediately appealable at this stage, and thus the Court should stay the case.[6]

---

[6] The cases cited by the District in support of immediate appeal are not Ninth Circuit authority, and each case dealt with a trial court's denial of an immunity at the summary judgment stage, not the 12(b) stage. *See Commuter Transp. Sys., Inc. v. Hillsborough Cty. Aviation Auth.*, 801 F.2d 1286, 1289 (11th Cir. 1986) (finding district court's order denying summary judgment on state-action immunity grounds a final appealable decision); *Tucson Unified Sch. Dist. v. Borek*, 322 P.3d 181, 184 (Ariz. Ct. App. 2014) (accepting special action jurisdiction of trial court order denying

Even assuming these issues are appealable as of right, it "is firmly established that an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue with other phases of the case." *Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982).[7] Although the Court must wait for the Ninth Circuit's determination before proceeding on those issues, the Court is not required to stay the entire case. *See Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990) ("Absent a stay, an appeal seeking review of collateral orders does not deprive the trial court of jurisdiction over other proceedings in the case, and an appeal of an interlocutory order does not ordinarily deprive the district court of jurisdiction except with regard to the matters that are the subject of the appeal."). As stated above, the Court declines to certify the three immunity issues for direct appeal, and it sees no reason to further delay the case.

The District asks the Court to use its discretion and stay the case because the District is likely to succeed on its immunity claims, and it will suffer irreparable injury if the Court denies the stay. (Doc. 83 at 9.) "A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S.

---

summary judgment on absolute immunity under A.R.S. § 12-820.01); *Pinal Cty. v. Cooper*, 2015 WL 6157397, at *2 (Ariz. Ct. App. Oct. 20, 2015) (allowing appeal of immunity claims denied on motion for summary judgment).

[7] The Court has serious doubts as to whether the two immunity issues are immediately appealable. "Federal appellate jurisdiction is generally limited to review of 'final decisions of the district courts of the United States.'" *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1012 (9th Cir. 2013) (quoting 28 U.S.C. § 1291)). The Court did not make a final decision on the state-action doctrine or absolute immunity under Arizona law. The District is free to raise these immunities at summary judgment.

418, 433 (2009). Whether to impose a stay is an exercise of judicial discretion guided by four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other [parties]; and (4) where the public interest lies." *Id.* at 434.

The Court has already concluded that the District is unlikely to succeed on its state-action immunity defense and that questions of fact preclude a determination that the District is absolutely immune under Arizona law. In addition, were the Court inclined to grant the stay, the harm suffered by SolarCity would likely outweigh the harm suffered by the District. SolarCity has allegedly been ousted from the market by the District. Not only does it lose sales, it loses customer goodwill and market share. The District, meanwhile, suffers only monetary harm as a result of litigation, i.e., the money it spends defending itself. Monetary harm is not irreparable. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."). As such, the Court will not exercise its discretion to stay this case.

Because the Court declines to certify these issues for appeal, and because the Court finds that the District failed to present "a substantial case for relief on the merits," see *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012), the District's motion to stay is denied.

IT IS ORDERED that the District's motion for certification pursuant to 28 U.S.C. § 1292(b), (Doc. 82), and motion to stay, (Doc. 83), are **DENIED**.

Dated this 21st day of December, 2015.

/s/ Douglas L. Rayes
Douglas L. Rayes
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SOLARCITY CORPORATION,

Plaintiff,

v.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, et al.

Defendants.

No. CV-15-00374-PHX-DLR
Filed October 27, 2015

ORDER

In December 2014, the Salt River Project ("SkP") announced a new rate structure for sale of retail electricity, which included additional fees for consumers who obtain part of their electricity from rooftop solar energy systems. Solar energy companies, environmentalists, and other interest groups opposed the rate change, arguing the new fee would dissuade consumers from installing solar energy systems. SRP approved the new rates in February 2015. Plaintiff SolarCity Corporation brings this action challenging the new rate structure under federal and state antitrust laws.

Before the Court are Defendant Salt River Project Agricultural Improvement and Power District's (the "District") motion to dismiss, (Doc. 53), and Defendant Salt River Valley Water Users' Association's (the "Association") motion to dismiss, (Doc. 52). The District has also filed a request for judicial notice. (Doc. 54.)

The Court held oral argument on October 14, 2015. For the reasons stated below, the District's motion to dismiss is granted in part, the Association's motion to dismiss is granted, and the District's motion for judicial notice is granted in part.

BACKGROUND

I. The Parties

SolarCity is the country's "largest installer of distributed solar energy systems." (Doc. 39, ¶ 15.) It sells and leases solar energy systems to residential and commercial customers "who then use the systems to generate electricity and thereby displace a portion of their electricity purchases from an electric utility." (*Id.*, ¶ 16.) Prior to the rate change, SolarCity "averaged almost 400 installations per month in SRP's service area." (*Id.*, ¶ 17.)[1]

SRP is a power-and-water utility comprised of two separate entities: the District and the Association (collectively referred to as "SRP"). (*Id.*, ¶¶ 18-19.) "The Association is a private, for-profit corporation that files reports with the state listing its Board members as 'directors' of the corporation." (*Id.*, ¶ 26.) It was formed in 1903 by private Salt River Valley landowners in order to "enter into contracts with the federal government for the irrigation of their land." (*Id.*, ¶ 27.) It continues to operate as a private corporation for the benefit of private landowners. (*Id.*, ¶ 29.)

The District was created in 1937 "for the purpose of refinancing the Association's debts by issuing interest-free bonds, thereby saving the private landowners very

---

[1] "Distributed solar systems generate electricity when the sun shines on them" and reduce "electric demand during the electric system's peak hours." (Doc. 39, ¶¶ 70-71.)

large sums of money each year." (*Id.*, ¶ 28.) The District is responsible for power and water storage work, and the Association manages "water delivery as an agent of the District." (*Id.*) The revenues generated from the District's sale of electricity subsidize the Association's "money-losing water operations, by [$100 million] per year." (*Id.*, ¶ 35(b).) The District "cannot impose ad valorem property taxes or sales taxes, enact any laws governing the conduct of citizens, or administer [other] such normal functions of government[.]" (*Id.*, ¶ 40.) The Arizona Corporation Commission ("ACC"), Arizona's public utility regulatory authority, "has no rate-setting or review authority over the District or its retail operations." (*Id.*, ¶ 42.)

II. Industry Allegations

SRP operates in the Phoenix-metro area. It provides electricity to residential and commercial customers through a variety of plans: (1) a Standard Plan based on perkilowatt usage, (2) a Time-of-Use Plan where rates vary according to the time of day, (3) a Community Solar Plan where customers purchase power generated by solar power plants at different rates, and (4) other governmental and commercial plans. (*Id.*, ¶ 56.)

SolarCity participates in this market, which it defines as "the provision of electric power to end-use residential, governmental, and businesses consumers[.]" (*Id.*, ¶¶ 48- 49.) It alleges it "directly competes with SRP because it offers equipment and services that provide electricity—specifically solar-generated electricity—to customers." (*Id.*, ¶ 50.) When customers purchase SolarCity's equipment and services, it reduces the amount of electricity they must purchase from SRP. (*Id.*)

SolarCity alleges "SRP has monopoly power in the retail market within the geographic market, currently providing more than 95% of the electricity used by retail customers in SRP territory." (*Id.*, ¶ 53.) This is evidenced by SRP's ability to "extract supra-competitive profits from its electrical operations and use them to fund its moneylosing water operations," as well as the high-barriers to entry in the market. (*Id.*, ¶¶ 54- 55.) Moreover, "[w]hether SRP customers self-generate power ... or not, all or virtually all of them still need to purchase both retail electric power and grid access from SRP to have access to power at times that alternative sources of power ... cannot meet the customers' needs." (*Id.*, ¶ 63.)

III. The Dispute

For several years, SRP provided incentives for customers to install distributed solar systems. (*Id.*, ¶ 72.) In 2011, however, "distributed solar increased in popularity and efficiency [and] SRP began to recognize that distributed solar could become a competitive threat in the longer term." (*Id.*, ¶ 78.) In response, "SRP developed its 'Community Solar' program, where customers purchase solar-generated electricity." (*Id.*, ¶ 79.) SolarCity alleges SRP implemented this program in part to ensure its ability to perform under several output requirement contracts with privately-owned solar farms. (*Id.*, ¶ 80.) However, it could not compete with distributed solar.

In December 2013, SRP lowered pricing for the Community Solar program, and shortly thereafter, "eliminated incentives to install distributed solar." (*Id.*, ¶¶ 82, 85.) One year later, in December 2014, "SRP announced its intent to adopt new [Standard Electric Price Plans ("SEPPs")] to apply new service terms and

rates to its customers." (*Id.*, ¶ 89.) Around the same time, SRP held several hearings and disclosed information relating to the SEPPs. (*Id.*, ¶ 91.) SolarCity participated in this process and voiced its opposition to the SEPPs. (*Id.*)

On February 26, 2015, the District's Board of Directors approved the SEPPs. (*Id.*, ¶¶ 97, 100.) The SEPPs retain the normal rate structure for customers that purchase all of their electricity from SRP. (*Id.*, ¶ 105.) These customers are charged a specific rate per kilowatt usage along with a fixed monthly service charge. (*Id.*) But for customers that purchase electricity from SRP and also generate their own electricity, the SEPPs impose a nearly 65% rate increase from the previous rate structure. (*Id.*, ¶ 107.) This increase appears as several additional charges applicable only to self-generating customers, as well as "reduced bill credits for the power that distributed solar customers send back into SRP's grid for SRP to re-sell to other customers." (*Id.*, ¶ 108(c) (emphasis in original).)

On March 2, 2015, SolarCity filed this action seeking damages and injunctive relief under federal and state antitrust laws. (Doc. 1.) On May 20, 2015, SolarCity filed an amended complaint alleging nine counts: (1) Monopoly Maintenance in violation of § 2 of the Sherman Act; (2) Attempted Monopolization in violation of § 2 of the Sherman Act; (3) Unreasonable Restraint of Trade in violation of § 1 of the Sherman Act, (4) Exclusive Dealing in violation of § 3 of the Clayton Act; (5) Monopoly Maintenance in violation of the Arizona Uniform State Antitrust Act ("AUSAA"); (6) Attempted Monopolization in violation of AUSAA; (7) Unreasonable Restraint of Trade in violation of AUSAA; (8) Intentional Interference with Prospective Economic Advantage; and (9) Intentional Interference

with Contract. (Doc. 39.) The District and the Association both move to dismiss all counts.

REQUEST FOR JUDICIAL NOTICE

The District requests the Court to take judicial notice of eleven exhibits, (Docs. 54-1 through 54-11). It asserts each exhibit contains information that is publicly available and directly related to allegations in the amended complaint. SolarCity objects to each of these documents except Exhibit 10, which is a copy of SolarCity's Notice of Claims sent to SRP in March 2015, (Doc. 54-10).

Rule 201 permits courts to take judicial notice of a fact "not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Ev. 201(b)(2). The advisory committee notes accompanying Rule 201 "explain that '[a] high degree of indisputability is the essential prerequisite' to taking judicial notice of adjudicative facts and that 'the tradition [of taking judicial notice] has been one of caution in requiring that the matter be beyond reasonable controversy.'" *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1151 (9th Cir. 2005) (quoting Fed. R. Ev. 201(a) & (b) advisory committee's notes). In addition, "[b]ecause the effect of judicial notice is to deprive a party of an opportunity to use rebuttal evidence, cross-examination, and argument to attack contrary evidence, caution must be used in determining that a fact is beyond controversy under Rule 201(b)." *Id.* (internal quotation marks and citation omitted).

SolarCity does not dispute the accuracy of Exhibit 10, nor does it object to the Court taking judicial notice of this document. Because the document is publicly

available and not subject to reasonable dispute, the Court will take judicial notice of Exhibit 10.

The District argues Exhibits 1-4 are necessary for the Court to apply judicial estoppel and preclude SolarCity from taking a position inconsistent from one taken before a different tribunal. It asserts Exhibits 1 and 2, which contain 153 pages from the record of a tax case SolarCity filed against the Arizona Department of Revenue and purportedly contain statements relating to SolarCity's lack of "competition" with public utilities, should be noticed by the Court. It also asserts Exhibits 3 and 4 contain additional evidence that SolarCity does not "compete" with SRP in the antitrust context. But SolarCity disputes the relevancy of the statements given the context in which they were made. It claims the District mischaracterizes the statements, and thus they should be narrowly interpreted to apply only to the issues considered during each proceeding. The Court agrees. Taking judicial notice of the documents would require analysis of the context in which the statements were made and may give rise to factual issues. Such an inquiry is not appropriate at the 12(b)(6) stage.

The District also requests judicial notice of Exhibits 5-7, which are documents from an administrative proceeding that purportedly indicate "the ACC has declined to certify any retail electricity competitor in Arizona and that, as a result, the State of Arizona has a policy in favor of regulation, not competition." (Doc. 63 at 7.)[2] But again, SolarCity disputes the context in which the documents were produced. The documents contain hearsay and opinions of non-experts that are

---

[2] Citations to pages in the Court's docket are to the page numbers stamped at the top of the page by the Court's CM/ECF system, not the page numbers at the bottom of each page.

subject to reasonable dispute. Taking judicial notice is not appropriate where the Court would be required to weigh evidence without providing SolarCity an opportunity to rebut. *See Rivera*, 395 F.3d at 1151.

Last, the District seeks judicial notice of three self-created documents, two of which are posted on the District's website and contain information related to the SEPPs, and one prepared in response to SolarCity's Notice of Claims submitted in March 2015. (Docs. 54-8, 54-9, 54-11.) SolarCity argues the documents are irrelevant to this case and disputes the accuracy of the statements contained therein. It also challenges the authenticity of the documents posted on the District's website as they contain no information as to when they were prepared and when they were posted online. Because these documents were prepared by the District, and because SolarCity challenges their content, the Court cannot conclude they are beyond reasonable dispute.

Accordingly, the Court will only take judicial notice of Exhibit 10. The remaining exhibits lack the "high degree of indisputability" necessary under Rule 201, and taking notice of the documents for the purposes suggested by the District would require the Court to engage in evidentiary and factual analysis inappropriate at this stage. The District's motion is therefore granted only with respect to Exhibit 10 and denied as to the remaining exhibits.

MOTIONS TO DISMISS

I. Legal Standard

When analyzing a complaint for failure to state a claim under Rule 12(b)(6), the well-pled factual allegations are taken as true and construed in the light most favorable to the nonmoving party. *Smith v. Jackson*,

84 F.3d 1213, 1217 (9th Cir. 1996). Legal conclusions couched as factual allegations are not entitled to the assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), and therefore are insufficient to defeat a motion to dismiss for failure to state a claim, *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2008). To avoid a Rule 12(b)(6) dismissal, the complaint "must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Dismissal is appropriate when the complaint lacks a cognizable legal theory, lacks sufficient facts alleged under a cognizable legal theory, or contains allegations disclosing some absolute defense or bar to recovery. *See Weisbuch v. Cty. of L.A.*, 119 F.3d 778, 783 n.1 (9th Cir. 1997); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

II. Analysis

Both the District and the Association move to dismiss SolarCity's amended complaint. The District argues: (1) it is absolutely immune from antitrust damages claims under federal and state law, (2) it is immune from antitrust liability under the state action immunity doctrine, (3) the filed-rate doctrine bars SolarCity's claims, (4) the *Noerr-Pennington* doctrine bars SolarCity's claims, (5) SolarCity lacks standing because it fails to adequately plead an antitrust injury, (6) SolarCity fails to state a claim under federal or state antitrust law, (7) SolarCity's state law claims are barred because it failed to comply with administrative procedures, and (8) SolarCity fails to adequately plead its tortious interference claims. The Association's motion raises similar arguments and differs only in that it argues (1) the amended complaint fails to implicate it in any wrongdoing, and (2) it and the District are not alter

egos. The Court will address the Association's motion first.

A. Allegations Against the Association

The Association argues SolarCity fails to directly implicate it in any wrongful conduct. It claims it has nothing to do with setting electricity rates and that the District enacted the SEPPs on its own. The Court agrees.

An antitrust plaintiff must "include allegations specific to each defendant alleging defendant's role in the alleged [misconduct]." *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1117 (N.D. Cal. 2008). Here, the District is alleged to be responsible for the anticompetitive conduct – not the Association. SolarCity does not allege that the Association had any role in promulgating the SEPPs, nor does it otherwise implicate the Association in any wrongdoing. SolarCity acknowledges that the Association's functions are limited to "managing water delivery as agent of the District." (Doc. 39, ¶ 28.) Moreover, SolarCity has admitted that it did not directly allege any wrongful conduct attributable to the Association. (*See* Doc. 76 at 18 ("It's true, Your Honor, that we don't specifically allege conduct that the Association engages in as opposed to the District[.]").)

SolarCity alleges the District and the Association are alter egos and hold themselves out as one entity: SRP. It alleges the District is a mere instrumentality of the Association, and therefore both are liable for the alleged anticompetitive conduct. The Association argues the doctrine does not apply between a political subdivision of the state and a private entity, and even if it does, the Association should be able to raise the same governmental defenses as the District.

The District is a "municipal corporation" formed under Arizona law and entitled to "the powers and privileges conferred ... or granted generally to municipal corporations by the constitution and statutes of the state, including immunity of its property and bonds from taxation." A.R.S. § 48-2302; *see also* Ariz. Const. art. 13, § 7 ("Irrigation, power, electrical, [and] agricultural improvement ... districts ... shall be political subdivisions of the state, and vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subdivisions under this constitution and laws of the state[.]"). The Association is a private corporation operating for the benefit of its shareholders. (Doc. 39, ¶ 29.)

The alter ego doctrine is generally applied between private parent and subsidiary corporations or between a private corporation and one of its shareholders. *See, e.g., Gatecliff v. Great Republic Life Ins. Co.*, 821 P.2d 725, 728 (Ariz. 1991); *Dietel v. Day*, 492 P.2d 455, 457 (Ariz. Ct. App. 1972). The rationale is that a corporation should not be used to shield assets or avoid liability for fraud or other tortious conduct. *See Dietel*, 492 P.2d at 728 ("If a corporation was formed or is employed for fraudulent purposes then clearly the corporate fiction should be disregarded."). Arizona courts have not addressed whether the doctrine applies between a political subdivision of the state and a private entity, and other jurisdictions have refused to apply it between two governmental entities. *See Foster Wheeler Energy Corp. v. Metro. Knox Solid Waste Auth., Inc.*, 970 F.2d 199, 202 (6th Cir. 1992) (rejecting the plaintiffs' attempt to hold the city and county liable for the contractual obligations of the city waste authority, a nonprofit corporation created by the city and the county); *McDaniel v. Bd. of Educ. of City of Chi.*, 956 F. Supp. 2d 887, 896 (N.D. Ill.

2013) ("It bears repeating that Plaintiffs have offered no Illinois or Seventh Circuit authority that applies a corporate veil-piercing theory to hold a municipality liable for the actions of a statutorily-created independent corporation."); *Katz v. Holzberg*, No. 13-1726 (FSH), 2013 WL 5523488, at *4 (D.N.J. Oct. 2, 2013) ("Katz does not provide a single case, from New Jersey or otherwise, supporting the application of corporate veil-piercing theory or parent-subsidiary law to the public authority context."); *Newcrete Prods. v. City of Wilkes-Barre*, 37 A.3d 7, 14 (Pa. Commw. Ct. 2012) (finding alter ego theory inapplicable between a city and city redevelopment authority); *DBT Yuma, L.L.C. v. Yuma Cty. Airport Auth.*, 340 P.3d 1080, 1082 (Ariz. Ct. App. 2014) (finding that a county and a statutorily-created "nonprofit civic corporation" were not alter egos).

SolarCity cites no Arizona case or statute that permits holding a private corporation liable for the acts of a municipal corporation, or vice versa. Because the Court agrees with *McDaniel*, which noted: "the traditional veil-piercing analysis employed by [state] courts is ill-suited to these circumstances," 956 F. Supp. 2d at 897, it finds the doctrine is not applicable to this case.

Arizona law requires "such unity of interest and ownership that the separate personalities of the corporation and owners cease to exist." *Dietel*, 492 P.2d at 457. But SolarCity does not allege the Association has any ownership interest in the District, nor could it, as the District is a political subdivision of the state. It does not allege the District has purchased shares of the Association or that funds were commingled between the entities. Perhaps most importantly, it fails to allege any resulting fraud or injustice. *See Loiselle v. Casa Mgmt. Grp., LLC*, 228 P.3d 943, 950 (Ariz. Ct. App. 2010) ("[D]isregarding the corporation's separate legal status

[must be] necessary to prevent injustice." (internal quotation marks omitted)). SolarCity's sole argument is that it would be unjust for the District to take advantage of its status as a political subdivision and raise its governmental defenses. But during argument, SolarCity admitted that holding the District and the Association as alter egos would not strip the District of these defenses, and under Arizona law, the District is entitled to raise them. SolarCity does not claim that the District is used as a vehicle to shield the Association's assets, or that it lacks the funds to satisfy an award of damages. No fraud or injustice is present here.

Last, SolarCity asserts the alter ego doctrine applies because the District and the Association were found to be alter egos in *Miller v. Salt River Valley Water Users Ass'n*, 463 P.2d 840 (Ariz. Ct. App. 1970). In *Miller*, the court held that the District and the Association were alter egos for purposes of performing a contractual obligation owed by the Association and later assumed by the District. *Id.* at 845-46. But *Miller*'s holding was based primarily on an assumption agreement executed between the District and the Association. It did not analyze whether the two entities were alter egos based on the similarities between the two entities.

Accordingly, because SolarCity has failed to provide any Arizona authority applying the alter ego doctrine to a municipal corporation and a private entity, the Court declines to apply the doctrine in this case. The Association is dismissed.

B. Antitrust Claims Alleged Against the District

The District raises two threshold arguments: (1) SolarCity fails to properly allege a relevant market, and (2) SolarCity fails to allege antitrust injury. The District also argues SolarCity fails to adequately allege

several elements of its antitrust claims. The Court will address the threshold issues first.

1. Threshold Issues

a. Relevant Market

SolarCity alleges violations of § 1 and § 2 of the Sherman Act, which govern monopolization and attempted monopolization, and § 3 of the Clayton Act, which governs exclusive dealing. These claims are brought under section 4 of the Clayton Act, which provides that "any person ... injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore[.]" 15 U.S.C. § 15(a). Each claim requires SolarCity to allege "that the defendant has market power within a 'relevant market.'" *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1044 (9th Cir. 2008). "Without a definition of [the relevant] market there is no way to measure [the company's] ability to lessen or destroy competition." *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965).

"[T]he [relevant] market must encompass the product at issue as well as all economic substitutes for the product." *Newcal Indus.*, 513 F.3d at 1045. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Interchangeability and cross-elasticity of demand refer to "the availability of products that are similar in character or use to the product in question and the degree to which buyers are willing to substitute those similar products for the product." *F.T.C. v. Swedish Match*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000). Ultimately, "the relevant mar-

ket must include 'the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business.'" *Newcal Indus.*, 513 F.3d at 1045 (quoting *Thurman Indus., Inc. v. Pay N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989)). The relevant market need not "be pled with specificity," and "[a]n antitrust complaint therefore survives a Rule 12(b)(6) motion unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect" or is "facially unsustainable." *Id.*

SolarCity alleges "the relevant product market is the provision of electric power to end-use residential, governmental, and businesses consumers. ... In this market, power may be provided by various sources, such as through outright sale of power, or by the lease or sale of distributed systems. ..." (Doc. 39, ¶ 49.) It alleges that its rooftop solar energy systems provide customers the ability to "generate their own electricity on their own property," which "reduces the amount of electricity that customers need to buy from SRP [and] allows customers to save money, and conserve natural resources." (*Id.*, ¶ 3.) In addition, distributed solar systems and SRP's Community Solar plan are close substitutes. (*Id.*, ¶ 57.)

SolarCity's relevant market, though narrowly defined, is not facially unsustainable. The product market is the provision of electricity to residential and commercial customers, which includes public utilities and distributed solar systems. The geographic market extends to the outer boundaries of SRP's service area, at which point consumers must purchase electricity from another regional source. Because distributed solar systems produce electricity at a cheaper rate than from public utilities, customers increasingly made the switch

to self-generate, reducing the amount of electricity they had to purchase from the District. Outside of distributed solar and public utility electricity, there are no other economically feasible electricity sources for consumers.

The District argues that a "retail electricity market that includes self-generated power *and* equipment suppliers to self-generating customers is facially implausible." (Doc. 53 at 21 (emphasis in original).) It asserts SolarCity's product is not interchangeable with retail electricity because customers who self-generate still must purchase retail electric power from SRP. Accepting SolarCity's market definition, "*any* supplier of *any* equipment used to generate electricity would be included," such as "companies that manufacture and supply wind turbines, hydroelectric dams, or gasoline generators." (*Id.* at 20, 21.)

The fact that customers who purchase SolarCity's product still have to purchase electricity from the District does not undermine the interchangeability of the two products. Customers can either purchase electricity from the District, or they can purchase SolarCity's product (or other distributed solar products) and generate some of their own electricity, which reduces their need to purchase the District's product. The extent to which the product is entirely interchangeable is lessened, but either way, the customer is receiving electricity. Moreover, "when a customer can replace the services of an external product with an internally-created system, this 'captive output' (i.e. the self-production of all or part of the relevant product) should be included in the same market." *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 186 (D.D.C. 2001) (internal quotations omitted). In addition, unlike distributed solar, gasoline generators, wind turbines, and hydroelec-

tric dams are not reasonable substitutes for public utility electricity because they are not economically feasible options for the average consumer.

SolarCity's alleged relevant market is defined narrowly because electricity customers allegedly have only two economically feasible choices for obtaining electricity in the area, either from the District or from solar power. Prior to the District's implementation of the SEPPs, SolarCity was installing a large number of distributed solar systems in the District's territory. (Doc. 39, ¶ 17.) Distributed solar systems were reducing the amount of electricity the District sold, thereby depriving it of business. *See Newcal Indus.*, 513 F.3d at 1045. When SRP imposed an extra fee for customers with self-generating systems, customers switched back to purchasing all of their electricity from SRP. This dynamic illustrates that SolarCity and the District have the actual ability to deprive each other of significant business in the relevant market. *See Newcal Indus.*, 513 F.3d at 1045 (quoting *Thurman*, 875 F.2d at 1374).

b. Antitrust Injury

In order to have standing to bring its claims, SolarCity must demonstrate antitrust injury. "Only those who meet the requirements for 'antitrust standing' may pursue a claim under the Clayton Act; and to acquire 'antitrust standing,' a plaintiff must adequately allege and eventually prove 'antitrust injury.'" *Glen Holly Entm't, Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1007 (9th Cir. 2003) (quoting *Am. Ad Mgmt, Inc. v. Gen. Telephone Co. of Cal.*, 190 F.3d 1051, 1054 (9th Cir. 1999)).

"Antitrust injury is defined not merely as injury caused by an antitrust violation, but more restrictively as 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes de-

fendants' acts unlawful.'" Glen Holly, 343 F.3d at 1007-08 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). In addition, "'the injured party [must] be a participant in the same market as the alleged malefactors.'" *Id.* at 1008 (quoting *Am. Ad*, 190 F.3d at 1057). "In other words, the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market." *Eagle v. Star- Kist Foods, Inc.*, 812 F.2d 538, 540 (9th Cir. 1987). "In analyzing whether [the plaintiff] participate[s] in the same market, the focus is upon the reasonable interchangeability of use or the cross-elasticity of demand between the services provided by [the plaintiff] and by [the defendants]." *Bhan v. NME Hosp., Inc.*, 772 F.2d 1467, 1470-71 (9th Cir. 1985). The antitrust laws are meant to "protect competition as a whole, not individual competitors." *Brunswick*, 429 U.S. at 488.

SolarCity plausibly alleges that it is a competitor of the District. It claims that it "offers equipment and services that provide electricity—specifically solar-generated electricity—to customers. By using SolarCity's equipment and services, customers reduce the amount of power that consumers purchase from SRP." (Doc. 39, ¶ 50.) It alleges it has the ability to deprive SRP of business. SolarCity further claims that "SRP fully recognizes that SolarCity and other distributed solar providers are competitors," given that at least one SRP employee has referred to SolarCity as "the enemy." (*Id.*, ¶ 51.) In addition, "a trade group with which SRP corresponded during the SEPPs' approval process—has published a report noting that distributed solar is one of many 'disruptive technologies ... *that may compete with utility-provided services*' and that '[a]s the cost curve for these technologies improves,

they could directly threaten the centralized utility model.'" (*Id.* (emphasis in original).) SolarCity alleges the Arizona legislature has "expressly recognized that 'self-generation' by customers reduces demand from entities such as SRP." (*Id.*, ¶ 52.)

The District asserts that SolarCity does not compete with the District as a matter of law because it has not applied for or obtained the certificate necessary to supply retail electricity in Arizona. But the statutes cited by the District apply to "electricity suppliers," which are defined as "public service corporation[s] that offer[] to sell electricity to a retail electric customer in this state." A.R.S. §§ 40-201, 40-207. They do not apply to private companies that provide alternate access to retail electricity.

The District also argues that SolarCity fails to allege harm to competition. But SolarCity alleges the SEPPs "have the purpose and effect of eliminating future distributed solar installations" and that the "only practicable way to escape the charges is to forgo installing distributed solar systems or to radically reduce peak usage," which is impracticable. (Doc. 39, ¶¶ 107, 109.) SolarCity further alleges the SEPPs make it "impossible for commercial, municipal, and educational customers to obtain any viable return on a new distributed solar investment," and that the "clear purpose of the SEPPs is not to recoup reasonable grid-related costs from distributed solar customers, but to prevent competition from SolarCity (and other providers of distributed solar) by punishing customers who deal with such competitors[.]" (*Id.*, ¶¶ 111, 113.) It asserts it has lost substantial business because the SEPPs have "made rooftop solar profoundly uneconomical." (*Id.*, ¶ 123.) These allegations sufficiently allege harm to competi-

tion in the retail electricity market. SolarCity has adequately alleged antitrust injury.

2. Antitrust Claims

a. Claims Based on an Illegal Agreement

Count three alleges unreasonable restraint of trade in violation of § 1 of the Sherman Act. Count four alleges exclusive dealing in violation of § 3 of the Clayton Act. Count seven alleges unreasonable restraint of trade in violation of Arizona's antitrust act.[3] An essential element of these counts is an illegal agreement between two or more persons to retrain trade or exclusively deal with one another. *See* 15 U.S.C. §§ 1, 14; A.R.S. § 44-1402. The District argues SolarCity has failed to plead an agreement.

SolarCity alleges the "SEPPs are agreements (indeed, agreements in restraint of trade) within the meaning of the antitrust laws because they form [] a critical part of the express contract that customers have with SRP." (Doc. 39, ¶ 118.) "The SEPPs are exclusionary because they punish customers for dealing with SRP's competitors by raising prices those customers must pay for a product[.]" (*Id.*, ¶ 119.) SolarCity alleges these agreements restrain trade and "constitute unreasonable exclusive-dealing agreements[.]" (*Id.*, ¶ 119(a).)

SolarCity fails to plausibly allege an agreement or conspiracy to restrain trade. Section 1 of the Sherman Act "prohibits agreements that unreasonably restrain trade by restricting production, raising prices, or oth-

---

[3] The language of the AUSAA is derived from the Sherman Act, and thus the two claims will be analyzed together. *See Lake Havasu City v. Rancho Disposal Serv., Inc.*, 860 F.2d 1089 (9th Cir. 1988) (unpublished table decision).

erwise manipulating markets to the detriment of consumers." *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1191 (9th Cir. 2015). Such agreements are either horizontal (between competitors), or vertical (between manufacturer and retailer). *Id.* SolarCity claims the SEPPs are unlawful vertical restraint agreements between the District and its customers. But an agreement requires at least two participants, and SolarCity does not allege that the customers agreed to restrain trade by raising rates. Rather, the District unilaterally set price terms that have an allegedly anticompetitive effect. Although "a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under § 1 in the absence of agreement." *Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986).

SolarCity argues "[u]nreasonable restraints of trade are often contained in agreements between firms and their customers, regardless of whether the customer shares the anticompetitive motivation of the supplier." (Doc. 58 at 27.) But it points to no authority in support, and finding that such an agreement exists between an antitrust malefactor and an unwitting customer would potentially subject the customer to criminal and civil liability simply for entering into a sales contract. An antitrust plaintiff must allege the antitrust defendant and another party "had a conscious commitment to a common scheme designed to achieve and unlawful objective." *49er Chevrolet, Inc. v. Gen. Motors Corp.*, 803 F.2d 1463, 1467 (9th Cir. 1986). SolarCity's complaint contains no such allegations.

SolarCity also fails to allege an agreement necessary for its exclusive dealing claim. Section 3 of the Clayton Act prohibits exclusive dealing arrangements.

Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 996 n.1 (9th Cir. 2010). "An exclusive dealing arrangement is an agreement in which a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time." *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012). Generally, the buyer is precluded by contract, either expressly or implicitly, from dealing with other vendors. *See id.* The plaintiff must show an agreement with the defendant, "though not necessarily [] explicit," that the buyer not purchase a competing product. *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 392 (7th Cir. 1984).

SolarCity fails to plausibly allege an agreement to exclusively deal. Two scenarios exist in this case: either customers who want to use distributed solar will pay the extra fee, or they will not self-generate to avoid the fee. Although the District allegedly intends the latter, charging a higher rate to customers who use distributed solar systems is not the same as an agreement to exclusively deal. The amended complaint does not allege an agreement, express or implied, in which customers will only purchase their electricity from the District.

In sum, the complaint does not allege facts that "raise a reasonable expectation that discovery will reveal evidence of an illegal agreement." *Twombly*, 550 U.S. at 556. Accordingly, count four will be dismissed.

b. Tying Arrangement Claim

Count three also alleges a tying arrangement under § 1 of the Sherman Act. "A tying arrangement exists when a seller conditions the sale of one product or service (the tying product or service) on the buyer's purchase of another product or service (the tied product or

service)." *Cty of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1157 (9th Cir. 2001). Tying arrangements "cannot exist unless two separate product markets have been linked." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 21 (1984), *abrogated on other grounds by* 547 U.S. 28 (2006). Whether separate markets exist depends "on the character of the demand for the two items," i.e., whether the items are "distinguishable in the eyes of buyers." *Id.* at 20. The District argues SolarCity has failed to plausibly allege that two distinct markets exist for grid access and retail electricity.

SolarCity claims the District is only selling grid access if customers also purchase electricity. It alleges "SRP uses its appreciable market power in the grid access market to coerce purchases from SRP in the retail market (or, alternatively, to use its appreciable economic power in one retail sub-market to coerce the purchase of power from SRP in another sub-market)[.]" (Doc. 39, ¶ 164.) It further alleges that "[t]hese markets are separate markets, as is illustrated by the separate demand for the products and services in each." (Id.) SolarCity alleges the grid access market has inelastic demand, has high barriers to entry, and that SRP has unbundled grid access from power sales. (*Id.*, ¶¶ 59, 61, 63, 67.) It claims that "the growth of distributed generation confirms that consumers have separate demand for power and for the facilities that enable always-on power." (Doc. 58 at 27.)

SolarCity fails to plausibly allege that a separate market exists for grid access. It alleges the "power delivery system," which includes "transmission" and "distribution" of electricity, is the "the grid." (Doc. 39, ¶ 61 (chart).) In other words, the grid is the delivery system for electricity. But without electricity running

through it, the grid is simply the District's infrastructure necessary to deliver its product to customers. Access to this infrastructure does not provide customers the ability to produce their own electricity, and SolarCity does not allege otherwise. It is thus implausible that a separate demand exists for grid access, especially given customers "still need to purchase *both* retail electric power and grid access from SRP to have access to power at all times[.]" (*Id.*, ¶ 63 (emphasis added).) Customers cannot simply "plug in" to the grid and generate power. The two products are not "distinguishable in the eyes of" customers, *see Jefferson Parish*, 466 U.S. at 20, as customers would have little use or demand for grid access alone.

SolarCity asserts this is a factual question. But its own allegations give rise to the inference that the two products are one and the same, not separate with distinct markets. As such, this claim fails.[4]

c. Monopoly Claims

Counts one and two allege monopoly maintenance and attempted monopolization in violation of § 2 of the Sherman Act, respectively. Counts five and six allege monopoly maintenance and attempted monopolization in violation of the AUSAA, respectively. The District does not dispute allegations that it has monopoly power in the relevant market. Instead, it argues SolarCity fails to adequately plead any anticompetitive conduct because there are no allegations of below-cost pricing or an antitrust duty to deal. These arguments mischaracterize SolarCity's theory and are unpersuasive.

---

[4] Count three also alleges unreasonable restraint of trade in violation of § 1 of the Sherman Act. Because both theories are implausible, count three is dismissed.

"Section 2 of the Sherman Act makes it unlawful for a person to monopolize or attempt to monopolize 'any part of the trade or commerce among the several States.'" *Aerotec Intern., Inc. v. Honeywell Intern., Inc.*, 4 F. Supp. 3d 1123, 1136 (D. Ariz. 2014) (quoting 15 U.S.C. § 2). "The possession of monopoly power alone is not an antitrust violation. It must be accompanied by an element of anticompetitive conduct." *Id.* at 1136-37. An antitrust plaintiff must demonstrate both the monopoly power of the defendant in the relevant market, and "'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 407 (2004) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S 585, 595 (1985), the owner of a ski resort brought suit under § 2 of the Sherman Act against a competing owner of three ski resorts. The plaintiff alleged the defendant monopolized the market for downhill skiing services by opting out of participating in an interchangeable liftticket, which provided customers access to all four resorts. *Id.* The parties had jointly offered this ticket for several years, but after the defendant opted out, the plaintiff's market share dropped significantly because customers found it inconvenient to only have access to the plaintiff's resort. *Id.* at 594. The defendant did not dispute that it had acquired a monopoly, but argued that it had no duty to deal or cooperate with the plaintiff and that its conduct was not anticompetitive. *Id.* at 600.

The Court disagreed. It found that although high value has been placed on the "right to refuse to deal

with other firms," such a right is not unqualified. *Id.* at 601. The defendant "elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years." *Id.* at 603. Such a decision is not necessarily anticompetitive, however, unless "the conduct in which it engaged to implement that decision, can fairly be characterized as exclusionary[.]" *Id.* at 604. The Court noted the important distinction between practices that exclude or restrict competition and those that reflect superior business acumen, success of a business, or luck. *Id.* Whether conduct is exclusionary depends on "its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way." *Id.* at 605. The Court found the "evidence supports an inference that [the defendant] was not motivated by efficiency concerns" and that it "made a deliberate effort to discourage its customers from doing business with its smaller rival." *Id.* at 610.

SolarCity's allegations are similar to those in *Aspen Skiing*. It alleges the District is a monopolist and imposed the SEPPs to exclude SolarCity from a market that was previously supporting such competition: "SRP has reversed a long-time course of conduct that had generated customer goodwill, benefitted SRP in the short-[term] and medium-term ... for the sake of excluding longer-term competition by preventing customers in its service area from installing distributed solar from competitors like SolarCity." (Doc. 39, ¶ 119(c).) SolarCity claims the SEPPs limit the choices of consumers because they will decide against purchasing SolarCity's products. These allegations plausibly allege anticompetitive conduct by an alleged monopolist.

The District argues that SolarCity fails to allege that the District "is willing to forsake short-term prof-

its to achieve an anticompetitive end." (Doc. 65 at 16.) But SolarCity expressly alleges this in its complaint. (*See* Doc. 39, ¶ 119(c).) The District also claims *Aspen Skiing* only applies in rare circumstances, (Doc. 65 at 16 n.9), but fails to explain why it does not apply to this case.

Accordingly, SolarCity has plausibly alleged that (1) the District has monopoly power, (2) it made a decision to change the market, (3) this decision was motivated by a desire to restrict competition, and (4) the decision has the effect of limiting competition. Counts one, two, five, and six survive.[5]

C. State Law Claims Alleged Against the District

Count eight alleges intentional interference with prospective economic advantage. Count nine alleges intentional interference with contract. The District argues these claims should be dismissed because SolarCity fails to demonstrate that its actions were "improper." (Doc. 53 at 29.)

SolarCity alleges SRP retroactively applied the SEPPs by only grandfathering in customers who installed distributed solar systems prior to December 8, 2014. (Doc. 39, ¶ 116.) SolarCity claims SRP chose this date to interfere with its contract with Maricopa Community Colleges "to implement multiple solar installations," which Maricopa County voted to authorize on

---

[5] The District argues SolarCity's state law antitrust claims are barred by A.R.S. § 30-810(B), which requires a "party" to a decision of the Board of the District to file an application for rehearing before it may bring an action in court. But SolarCity claims it was not a party to the decision, and the Court has declined to take judicial notice of the evidence on which the District relies that purportedly demonstrates otherwise. The Court will not dismiss the claims on this basis.

December 9, 2014. (*Id.*, ¶ 120(b).) Coupled with SolarCity's allegations of illegal anticompetitive conduct by the District, these allegations are sufficient, and these claims will not be dismissed.

D. The District's Defenses

The District raises several defenses to SolarCity's claims, many of which rest on its status as a political subdivision of the state. Each will be addressed in turn.

1. Local Government Antitrust Act

The Local Government Antitrust Act ("LGAA") provides that "[n]o damages, interest on damages, costs, or attorney's fees may be recovered under section 4 ... of the Clayton Act ... from any local government[.]" 15 U.S.C. § 35(a). "Local government" is defined in relevant part as "a school district, sanitary district, or any other special function governmental unit established by State law in one or more States[.]" *Id.* § 34(1). The LGAA "provides absolute immunity when the terms of the statute are met" and "courts should strive to resolve the immunity issue as early as possible, with minimum of expense and time to the parties." *Sandcrest Outpatient Servs., P.A. v. Cumberland*, 853 F.2d 1139, 1148 n.9 (9th Cir. 1988); *see also Palm Springs Med. Clinic, Inc. v. Desert Hosp.*, 628 F. Supp. 454 (C.D. Cal. 1986). "The question of whether a defendant is entitled to absolute immunity is a question of law[.]" *Tennison v. City & Cty. of S.F.*, 570 F.3d 1078, 1087 (9th Cir. 2008).

The District argues it falls under the protection of the LGAA because it is a special function governmental unit established under A.R.S. § 48-2301. As a matter of law, the District is a political subdivision of the state

created by state law and the state constitution. *See* A.R.S. § 48-2302; *see also* Ariz. Const. art. 13, § 7. SolarCity's allegations do not undermine the District's status. Consequently, the LGAA shields the District from SolarCity's antitrust damages claims.[6]

2. Absolute Immunity under State Law

The District argues it is absolutely immune from SolarCity's state law damages claims under Arizona law. A.R.S. § 12-820.01 provides "absolute immunity" for a public entity's "exercise of a judicial or legislative function." As a political subdivision of the state, the District is a "public entity" under A.R.S. § 12-820(7) ("'Public entity' includes this state and any political subdivision of this state.").

The District argues that ratemaking by a public utility is a legislative function. *See Arizona Corp. Comm'n v. State ex rel. Woods*, 830 P.2d 807, 812 (Ariz. 1992) (noting ratemaking is a legislative power of the Arizona Corporation Commission); *Arizona Corp. Comm'n v. Superior Court*, 480 P.2d 988, 991 (Ariz. 1971) (same). But the cases it cites apply to the Arizona Corporation Commission's ratemaking power, not that of the District. Whether the District's ratemaking power is a legislative function is a question of fact not appropriately before the Court.

Alternatively, the District argues it is immune because it exercised "an administrative function involving

---

[6] SolarCity argues the District must demonstrate that an award of antitrust damages would fall upon taxpayers in the absence of immunity. It cites *United Nat'l Maint., Inc. v. San Diego Conv'tn Ctr. Corp.*, 2010 WL 3034024, at *4 (S.D. Cal. Aug. 3, 2010) in support of this requirement. But that case cites no authority for such a requirement, and the Court finds none in the language of the statute.

the determination of fundamental governmental policy." A.R.S. § 12-820.01(B). It asserts the rate changes were necessary "to cover the fixed costs of maintaining the electrical grid so that the District can provide electricity and water to hundreds of thousands of customers." (Doc. 53 at 8.) But this is question of fact not appropriately addressed at this stage, and the Court will not dismiss the state claims on these grounds.

3. Arizona's Notice of Claim Statute

The District claims SolarCity's state law claims should be dismissed because it failed to comply with A.R.S. § 12-821.01, which requires claimants to submit a notice of claim specifying the amount of damages it seeks against the public entity prior to filing suit. SolarCity argues it submitted the required notice, but the District argues it failed to comply with the statute because it did not identify a specific sum that it would accept to settle its claims. "Rather, SolarCity's notice states that it 'is not willing to settle damages independent of [the District's] consent to cease and desist from the business practices at issue ... in a manner enforceable by court injunction or contempt proceedings.'" (Doc. 53 at 9.)

SolarCity's notice of claim, which the Court has taken judicial notice of, specified the amount of damages as $45 million, but conditioned settlement on injunctive relief. (Doc. 54-10 at 2.) Conditional settlement offers do not violate the statute, *see Auble v. Maricopa Cty.*, No. CV 08-1822-PHX-MHM, 2009 WL 3188378, at *3 (D. Ariz. Sept. 30, 2009), and thus the Court will not dismiss SolarCity's state law claims on this ground.

4. State Action Doctrine

The District argues it is immune from antitrust liability under the state action doctrine, which "exempts qualifying state and local government regulation from federal antitrust, even if the regulation at issue compels an otherwise clear violation of the federal antitrust laws." *Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 943 (9th Cir. 1996) (internal quotation marks and citation omitted). "A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the State provides active supervision of anticompetitive conduct undertaken by private actors." *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992).

The question of whether Arizona has articulated a clear policy permitting anticompetitive conduct in the retail electricity market and "the question of whether a state has 'actively supervised' a state regulatory policy [are] a factual one[s] which [are] inappropriately resolved in the context of a motion to dismiss." *Cost Mgmt. Servs.*, 99 F.3d at 942-43. SolarCity alleges that Arizona has a policy permitting competition in the relevant market and that the District operates without supervision. (Doc. 39, ¶¶ 42, 65.) This is all that is necessary at this stage.

5. Filed-Rate Doctrine

The District argues all of SolarCity's claims are barred by the filed-rate doctrine, which "precludes interference with the rate setting authority of an administrative agency[.]" *Wah Chang v. Duke Energy Trading & Mktg.*, 507 F.3d 1222, 1225 (9th Cir. 2007). Rates that are deemed reasonable by a regulatory agency are insulated from challenge. *See Ark. La. Gas Co. v. Hall*,

453 U.S. 571, 577 (1981). Originally, the doctrine applied to rates reviewed and filed by federal agencies. *See id.* at 578 (applying doctrine to bar claim challenging rates set by the Federal Energy Regulatory Commission for sale of natural gas). Several states have adopted the doctrine, *see Qwest Corp. v. Kelly*, 59 P.3d 789, 800 (Ariz. Ct. App. 2002) (listing cases), but Arizona has not, *see id.*; *see also Johnson v. First Am. Title Ins. Co.*, No. CV-08-01184-PHX-DGC, 2008 WL 4850198, at 4 (D. Ariz. 2008) (Arizona "has never adopted the filed-rate doctrine").

The Court need not determine whether Arizona would adopt the filed-rate doctrine because it does not apply here. SolarCity does not challenge the District's electricity rates as unreasonable, but instead alleges the District imposed the rates to exclude it from the market. Whether the rates are reasonable has no bearing on whether the District engaged in anticompetitive conduct. The Court will not dismiss SolarCity's claims on this ground.

6. *Noerr-Pennington* Doctrine

Last, the District argues the *Noerr-Pennington* doctrine bars all of SolarCity's claims. But the *Noerr-Pennington* doctrine protects those who lobby in favor of anticompetitive governmental action, not those who actually commit it. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988). It has no application in this case, and the District appears to have abandoned the argument in its reply brief. (See Doc. 65.)

CONCLUSION

Accordingly, the Association is dismissed from this action. Counts three and four, as well as SolarCity's

claims for damages under federal and state antitrust laws, are dismissed.

IT IS ORDERED that

1. The District's motion to dismiss, (Doc. 53), is **GRANTED IN PART.**
2. The Association's motion to dismiss, (Doc. 52), is **GRANTED.**
3. The District's request for judicial notice, (Doc. 54), is **GRANTED IN PART.**

Dated this 27th day of October, 2015.

/s/ Douglas L. Rayes
Douglas L. Rayes
United States District Judge

RECORD AND BRIEFS

FILED
OCT 11 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 17-368

In the Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Petitioner,

v.

SOLARCITY CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

STEVEN C. HOLTZMAN
SEAN P. RODRIGUEZ
BOIES SCHILLER FLEXNER LLP
1999 Harrison St., Suite 900
Oakland, CA 94612
(510) 874-1000

RICHARD A. FEINSTEIN
Counsel of Record
WILLIAM A. ISAACSON
KAREN L. DUNN
AMY J. MAUSER
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, N.W.
Washington, D.C. 20005
(202) 237-6131
rfeinstein@bsfllp.com

Counsel for Respondent

(Additional Counsel Listed on Inside Cover)

JOHN F. COVE, JR.
SHEARMAN & STERLING LLP
535 Mission Street, 25th Floor
San Francisco, CA 94105
(415) 616-1100

KEITH BEAUCHAMP
ROOPALI H. DESAI
COPPERSMITH BROCKELMAN PLC
2800 N. Central Avenue, Suite 1200
Phoenix, AZ 85004
(602) 224-0999

QUESTION PRESENTED

Whether an order denying a motion to dismiss under the antitrust state-action doctrine can satisfy this Court's stringent standard for interlocutory review under the collateral-order doctrine and, if so, whether the collateral-order doctrine is satisfied where the defendant is a business enterprise that lacks sovereign powers, or where the district court anticipated that the defense would be raised again after the pleadings stage.

RULE 29.6 STATEMENT

Respondent SolarCity Corporation is wholly owned by Tesla Motors, Inc., a publicly traded company.

TABLE OF CONTENTS

QUESTION PRESENTED i
RULE 29.6 STATEMENT ii
INTRODUCTION 1
STATEMENT OF THE CASE 4
I. The Doctrines At Issue 4
II. The Parties 6
III. The Challenged Conduct 9
IV. District Court Proceedings 10
V. Ninth Circuit Proceedings 12
REASONS TO DENY THE PETITON 13
I. This Case Does Not Depend On The Split That Petitioner Cites, And In Any Event That Split Is Weak And Self-Correcting 13
A. No Decision in the Past Two Decades Supports SRP's Position 13
B. This Case Does Not Require Resolving A Circuit Split 17
C. The Broader Circuit Split Identified by Petitioner Is Narrow And Self-Correcting 18

II. This Case Is Not An Appropriate Vehicle For Review Of The Question Presented 22

III. The Decision Below Is Correct 25

IV. A Stay Of This Action For Any Reason Is Unwarranted 31

CONCLUSION 32

TABLE OF AUTHORITIES

CASES

A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.,
263 F.3d 239 (3d Cir. 2001) 27

Abney v. United States,
431 U.S. 651 (1977) 30

Acoustic Systems v. Wenger,
207 F.3d 287 (5th Cir. 2000) ..... passim

Auraria Student Housing at the Regency, LLC v. Campus Village Apartments, LLC,
703 F.3d 1147 (10th Cir. 2013) 16, 17, 18

Ball v. James,
451 U.S. 355 (1981) ..... passim

California v. Am. Stores Co.,
492 U.S. 1301 (O'Connor, Circuit Justice 1989) 31

City of Mesa v. Salt River Proj. Agric. Improvement & Power Dist.,
92 Ariz. 91 (1962) 7, 27

Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority,
801 F.2d 1286 (11th Cir. 1986) 15

Cost Mgmt. Servs. v. Washington Natural Gas Co.,
99 F.3d 937 (9th Cir. 1996) 11

Cunningham v. Hamilton Cnty.,
527 U.S. 198 (1999) 21

Digital Equip. Corp. v. Desktop Direct, Inc.,
511 U.S. 863 (1994) 4, 21, 28

Flanagan v. United States,
465 U.S. 259 (1984) 30

FTC v. Phoebe Putney Health System, Inc.,
568 U.S. 216 (2013) ..... passim

Gorenc v. Salt River Proj. Agric. Imp. & Power Dist.,
869 F.2d 503 (9th Cir. 1989) 8

Gulfstream Aerospace Corp. v. Mayacamas Corp.,
485 U.S. 271 (1985) 22, 25

Huron Valley Hospital, Inc. v. City of Pontiac,
792 F.2d 563 (6th Cir. 1986) 14, 17, 27

Johnson v. Jones,
515 U.S. 304 (1995) 23, 28

Klehr v. A.O. Smith Corp.,
521 U.S. 179 (1997) 22

Local 266, I.B.E.W. v. Salt River Agric. Improvement & Power Dist.,
78 Ariz. 30 (1954) 8, 9, 29

Martin v. Memorial Hosp. at Gulfport,
86 F.3d 1391 (5th Cir. 1996) 15, 16, 18, 19

Mohawk Indus., Inc. v. Carpenter,
558 U.S. 100 (2009) 4, 21

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 22

Mothershed v. Justices of the Supreme Court,
410 F.3d 602 (9th Cir. 2005) 24

N.C. State Bd. of Dental Exam'rs v. FTC,
135 S. Ct. 1101 (2015) ..... passim

Nunag-Tanedo v. East Baton Rouge Parish School Bd.,
711 F.3d 1136 (9th Cir. 2013) 30

Ortiz v. Jordan,
562 U.S. 180 (2011) 23, 28

Osborn v. Haley,
549 U.S. 225 (2007) 20

Otter Tail Power Co. v. United States,
410 U.S. 366 (1973) 9, 31

Parker v. Brown,
317 U.S. 341 (1943) ..... passim

S.C. State Bd. of Dentistry v. FTC,
455 F.3d 436 (4th Cir. 2006) ..... passim

Sell v. United States,
539 U.S. 166 (2003) 20, 21

Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Par.,
171 F.3d 231 (5th Cir. 1999) 16

Swint v. Chambers Cty. Comm'n,
514 U.S. 35 (1995) 4, 21

Van Cauwenberghe v. Biard,
486 U.S. 517 (1988) 21

Will v. Hallock,
546 U.S. 345 (2006) ..... passim

STATUTES

15 U.S.C. § 1 *et seq.* 5

42 U.S.C. § 1983 ..... 21, 22

Ariz. Rev. Stat. § 48-2383 (West 2017) 8

OTHER AUTHORITIES

Areeda & Hovenkamp, Antitrust Law,
¶ 224e (4th ed. 2014) 27

INTRODUCTION

Respondent SolarCity Corporation ("SolarCity") brought this case against Petitioner Salt River Agricultural Improvement and Power District ("SRP") under both federal and state antitrust law. SolarCity offers solar panels and services that allow consumers to shift electricity purchases away from utility companies. SRP is an incumbent electric utility in the Phoenix metropolitan area. This suit challenges SRP's anticompetitive conduct that excludes competition from SolarCity and other distributed power firms.

This Court has previously explained that SRP is "essentially" a "business" enterprise that has limited governmental authority, lacks any general sovereign powers, and that does not exercise any traditional sovereign prerogative in its unregulated retail electric business. *Ball v. James*, 451 U.S. 355, 367-70 & n.11 (1981).

At the pleading stage, the district court declined to dismiss SolarCity's challenge to SRP's conduct under the federal state-action doctrine. SRP then noticed an appeal of the denial of its motion to dismiss based on the collateral-order doctrine. The Ninth Circuit dismissed the appeal, holding that the antitrust state-action doctrine is at most an "immunity" from liability, not an immunity from suit or the judicial process, and therefore an issue that can be effectively reviewed after final judgment. The Ninth Circuit thereby joined every other Circuit in the past twenty years that has been asked to expand

the collateral-order doctrine to accommodate a state-action doctrine appeal (the Fourth, Fifth, and Tenth), as well as the Sixth Circuit, which has refused interlocutory state-action appeals for over forty years.

There is no Circuit split on the dispositive question in this action: whether collateral-order review is available for a denial of an antitrust state-action doctrine motion to dismiss brought by an entity that is essentially a private business. No Circuit has approved collateral-order jurisdiction in such circumstances. Rather, all five Circuits to have addressed the issue in this context will dismiss such appeals (the Fourth, Fifth, Sixth, Ninth, and Tenth).

Petitioner seeks certiorari on a broader question, and one that need not be answered to resolve this dispute: whether *any* order denying an antitrust state-action defense may be immediately appealable, regardless of the nature of the petitioner. On that question, there is nominally a 3-2 Circuit split, with the Fifth and Eleventh Circuits in the minority, having taken the position advocated by SRP in opinions issued over twenty years ago. Since then three other Circuits have held to the contrary and one of the two minority Circuits has taken significant steps toward joining the majority. That modern authority is coalescing against permitting interlocutory appeals from denials of antitrust state-action motions to dismiss reflects this Court's increasingly firm admonitions that the collateral-order doctrine is narrow and applies only when stringent requirements are met.

The growing obsolescence of the broader split is also consistent with this Court's recent state-action doctrine jurisprudence. Twice in recent years the Court has reiterated that the state-action doctrine is a narrow and "disfavored" tool of statutory interpretation—far from the strong immunity from suit or the judicial process itself that the collateral-order doctrine requires.

The petition should be denied because:

1. The collateral-order doctrine issue, which involves an essentially private business enterprise, does not implicate any Circuit split, and the Circuit split that does exist is in the process of resolving itself.

2. This case is an inappropriate vehicle for this Court's review because the district court's order fails to meet the requirements for collateral-order review independent of the question presented by SRP. The collateral-order doctrine requires an order that "conclusively determines" the issue at hand, but here the district court expressly reserved any conclusive determination for a later stage.

3. This case is also a poor vehicle for addressing collateral-order jurisdiction because SRP will face suit regardless of the resolution of its interlocutory appeal concerning the antitrust state-action doctrine. Respondent's independent state law antitrust claims are not subject to SRP's claimed antitrust state-action defense.

4. The decision below is correct. The Ninth Circuit panel (of Judges Kozinski and Friedland, joined by Judge Gilman of the Sixth Circuit, sitting by designation) comprehensively addressed the issues in a soundly reasoned opinion that is fully consistent with this Court's precedent and the Fourth and Sixth Circuits' well-reasoned opinions.

STATEMENT OF THE CASE

I. The Doctrines At Issue

Collateral-Order Doctrine. The collateral-order doctrine is a narrow exception to the prohibition on interlocutory appeals. This Court's decisions over the years have explained, with increasing emphasis, that attempts to extend the doctrine are disfavored and viewed "with a jaundiced eye." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106-07 (2009); *Will v. Hallock*, 546 U.S. 345, 349-50 (2006); *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 43 (1995) ("jaundiced eye") (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994)).

To satisfy the collateral-order doctrine, a decision must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. at 349 (citations and internal quotation marks omitted). Immunities from suit—such as sovereign immunity under the Eleventh Amendment and qualified immunity—generally meet these requirements. *Id* at 350. In contrast, defenses and doctrines that provide only

immunity from liability (for example, based on statutory construction) do not. *Id.*

Antitrust State-Action Doctrine. All persons, including state actors, are presumptively subject to antitrust laws because those laws embody our "fundamental national values of free enterprise and economic competition." *FTC v. Phoebe Putney Health System, Inc.*, 568 U.S. 216, 225 (2013). However, this Court in *Parker v. Brown*, 317 U.S. 341 (1943), recognized what the Court has since made clear is a narrow and "disfavored" exception for state actors under some circumstances. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1110 (2015) (citation and internal quotation marks omitted. *Parker* inferred that "because 'nothing in the language of the Sherman Act [15 U.S.C. § 1 *et seq.*] or in its history' suggested that Congress intended to restrict the sovereign capacity of the States to regulate their economies, the Act should not be read to bar States from imposing market restraints 'as an act of government.'" *Phoebe Putney*, 568 U.S. at 224 (quoting *Parker*, 317 U.S. at 350, 352). As antitrust law has matured, *Parker*'s inference from Congressional silence has grown into a formalized antitrust defense known as the antitrust state-action doctrine.

A proponent of the antitrust state-action doctrine must establish that it acted pursuant to a "clearly articulated" policy and that the State "affirmatively contemplated the displacement of competition such that the challenged anticompetitive effects can be attributed to the 'state itself.'" *Id.* at 219, 229

(quoting *Parker*, 317 U.S. at 352). Putative state actors that lack general governmental powers and have structural features that create incentives to favor private interests must also demonstrate that they are "actively supervised" by an arm of the State. *N.C. State Bd.*, 135 S. Ct. at 1110, 1114 (citations and internal quotation marks omitted). These requirements prevent entrenched "parochial" interests from excluding competition any further than a State sovereign actually approves and supervises. *Id.* at 1112.

II. The Parties

Respondent SolarCity offers products and services that use solar panels and related systems to allow consumers to substitute purchases of retail electricity from utilities with electricity generated at the customer's site. Am. Compl. ¶¶ 3, 50, 70-71 (ER47, ER56, ER59-ER60).

Petitioner SRP is an electric utility in the Phoenix, Arizona metropolitan area. SRP was created in 1903 to take advantage of a federal law that provided interest-free loans for landowners to build reclamation projects to irrigate their lands. *Ball*, 451 U.S. at 357-58. Reclamation projects were allowed to sell hydroelectric power to fund those projects. *Id.* at 358. During the Great Depression, SRP successfully lobbied the Arizona legislature for a statute denominating SRP a political subdivision so the landowners who ran SRP could avoid income taxes and sell tax-free bonds. *Id.* Arizona denominates SRP a public entity, but as this Court

has explained, SRP and organizations like it are "essentially business enterprises, created by and chiefly benefitting a specific group of landowners." *Id.* at 368 (citations omitted). Among other things, SRP lacks "the crucial powers of sovereignty typical of a general purpose unit of government" and SRP's electric business does not implicate any traditional sovereign power. *Id.* at 367-70.

Specifically, SRP "is a governmental entity only in the limited sense" of its water and reclamation functions, and "does not exercise the crucial powers of sovereignty typical of a general purpose unit of government." *Id.* at 372 (Powell, J., concurring). SRP became a major electricity utility by historical accident, and its electric operations are therefore considered "proprietary" activities for nearly all purposes. *City of Mesa v. Salt River Proj. Agric. Improvement & Power Dist.*, 92 Ariz. 91, 100 (1962). Indeed,

> the sole legislative reason for making water projects [such as SRP] public entities was to enable them to raise revenue through interest-free bonds, and [] the development and sale of electric power was undertaken not for the primary purpose of providing electricity to the public . . . .

Ball, 451 U.S. at 369.

"Most municipal corporations are owned by the public and managed by public officials." *Local 266, I.B.E.W. v. Salt River Agric. Improvement & Power*

Dist., 78 Ariz. 30, 44 (1954). In contrast, SRP is owned and run by private landholders, and "[t]he profits from the sale of electricity are used to defray the expense in irrigating these private lands for personal profit . . . . [T]he District operates for the benefit of these 'inhabitants of the district' who are private owners." *Id.* Only landholders in SRP's original geographic area can vote in SRP elections, leaving non-landowner natural persons, corporations, and charitable, educational and religious institutions, as well as all landowners outside SRP's original geographic area, unrepresented. Am. Compl. ¶ 32 (ER52); *Ball*, 451 U.S. at 358; *Gorenc v. Salt River Proj. Agric. Imp. & Power Dist.*, 869 F.2d 503, 504 (9th Cir. 1989); Ariz. Rev. Stat. § 48-2383 (West 2017). For the majority of the seats on SRP's Board (ten seats), landowners' votes are counted proportionate to their landholdings, such that a vote cast by the holder of ten acres counts ten times as much as a vote cast by the holder of one acre. *See* Ariz. Rev. Stat. § 48-2383. About one-third of SRP's electricity customers have no right to vote in SRP elections. Am. Compl. ¶ 32 (ER52).

SRP's retail electric business is unregulated. The business answers only to its own self-interested Board, not a public utility commission or any similar independent body. *Id.* ¶ 42 (ER55). SRP is thus free to serve private, not public interests. As this Court has explained, SRP takes profits from electricity sales and uses them to subsidize irrigation and canal water so that, for example, certain agricultural

interests can farm cheaply by a city in the desert. *See Ball*, 451 U.S. at 365-66.

In short, SRP makes money from electric customers and pays out dividends in the form of irrigating "private lands for personal profit." *Id.* at n.17 (internal quotation marks omitted) (quoting *Local 266*, 78 Ariz. at 44).

III. The Challenged Conduct

In recent years, consumer prices for rooftop solar have dropped and become cost-competitive with SRP's electricity offerings. Am. Compl. ¶¶ 78-86 (ER61-ER62). More consumers than ever substitute purchases from utilities with rooftop solar. *Id.* ¶¶ 50-52 (ER56). As solar generation increased in popularity and efficiency, SRP started to view solar as a long-term competitive threat to its electricity sales and profits. *Id.* ¶ 78 (ER61).

Facing competition for the first time ever, SRP had a choice between competing in the market or using its monopoly power to exclude competition. The antitrust laws require, and our economic system presumes, that firms respond to competition on the merits in ways that benefit consumers, including by reducing prices, increasing efficiency, enhancing customer service, or investing in innovation. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) (addressing electric industry). SRP first attempted to compete on the merits by developing its own solar offerings. Am. Compl. ¶ 79 (ER61). However, consumers continued to prefer SRP's solar competitors. *Id.* ¶¶ 81, 86 (ER62). Then, rather

than offer consumers a better product or value, SRP used its unregulated market power to impose terms that lock customers into remaining what SRP calls "requirements" customers—those who satisfy all their electric needs from, and deal exclusively with, SRP. *Id.* ¶¶ 105-07, 114 (ER65-ER66, ER68). SRP has offered only incoherent and pretextual justifications for this new regime. *Id.* ¶¶ 126-41 (ER73-ER77).

SRP's plan worked. *Id.* ¶ 116. The new requirements it mandated for its customers had a drastic anticompetitive effect. *Id.* ¶¶ 7, 119 (ER48, ER68). New rooftop solar applications—from customers of any firm, not just SolarCity—dropped by about 96 percent. *Id.* ¶¶ 7, 123 (ER48, ER71). SolarCity was forced to stop selling in SRP territory and to relocate employees. *Id.* ¶ 125 (ER72).

IV. District Court Proceedings

SolarCity sued SRP on March 2, 2015, asserting violations of the federal and Arizona antitrust laws, as well as common law torts for intentional interference. Am. Compl. ¶¶ 143-201, 210-217 (ER78-ER84, ER85).

On June 23, 2015, SRP moved to dismiss SolarCity's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). D. Ariz. ECF No. 53. SRP's motion argued, among other things, that the antitrust state-action doctrine barred SolarCity's antitrust claims. Pet. App. 67a.

On October 27, 2015, the district court granted in part and denied in part SRP's motion. App. 68a-69a. With respect to the state-action doctrine, the order held that SRP failed to show it could invoke the state-action doctrine "at this stage" and that factual questions remained. *Id.* at 67a (internal quotation marks omitted) (quoting *Cost Mgmt. Servs. v. Washington Natural Gas Co.*, 99 F.3d 937, 942-43 (9th Cir. 1996)). When the district court later denied SRP's motion to certify an interlocutory appeal, it reiterated that the motion to dismiss order did not conclusively resolve the state-action question. Pet. App. 33a ("The District is free to raise these immunities at summary judgment").

SRP noticed an interlocutory appeal, arguing that the state-action doctrine and SRP's nominal governmental status provide it an "immunity from suit" comparable to the Eleventh Amendment or qualified immunity. ER42-ER43. SRP simultaneously moved for a stay in the District Court. D. Ariz. ECF No. 83 (ER93). The stay was denied. D. Ariz. ECF No. 102 (ER95). The parties completed fact and expert discovery and filed cross-motions for summary judgment as the appeal was pending. D. Ariz. ECF Nos. 208, 210. At the close of discovery, Petitioner filed a renewed motion to stay pending resolution of the Ninth Circuit appeal. D. Ariz. ECF No. 148. The district court granted Petitioner's motion to stay shortly after the parties filed summary judgment motions. D. Ariz. ECF No. 241.

V. Ninth Circuit Proceedings

The Ninth Circuit dismissed SRP's appeal for lack of jurisdiction, explaining that the state-action immunity doctrine is a "defense to liability and not an immunity from suit" and therefore could not satisfy the "effectively unreviewable" requirement. Pet. App. 11a. The Ninth Circuit rejected SRP's argument that the collateral-order doctrine applies because of the constitutional origins of state-action immunity, noting that an immunity's constitutional origin is not determinative of whether immediate appeal is available. *Id.* The Ninth Circuit also rejected SRP's claim that immediate appeal was necessary to avoid distracting litigation, concluding that "the possibility of mere distraction or inconvenience to [SRP] does not give us jurisdiction here." *Id.* at 13a.

The Ninth Circuit recognized that it was joining the Fourth and Sixth Circuits on one side of a circuit split concerning the availability of collateral-order review of denials of motions to dismiss based on the antitrust state-action doctrine. *Id.* at 14a-15a. However, it also expressly noted that this Court's recent guidance on the narrowness of the collateral-order doctrine has grown stronger since the initial contrary decisions of the Fifth and Eleventh Circuits. *Id.* at 16a-17a.

SRP did not move for *en banc* hearing. Instead, SRP moved to stay issuance of the mandate. Ninth Cir. ECF No. 87. The motion to stay was denied. Ninth Cir. ECF No. 90.

Upon remand, the district court set trial for April 2018. D. Ariz. ECF No. 258.

REASONS TO DENY THE PETITON

I. This Case Does Not Depend On The Split That Petitioner Cites, And In Any Event That Split Is Weak And Self-Correcting

Certiorari should be denied because this case's resolution does not depend on the broader split Petitioner cites. Where, as here, a petitioner is a fundamentally private enterprise, all Circuits to have reached the question have denied interlocutory review. Moreover, the broader split identified by Petitioner is weak and on its way to resolving itself based on this Court's more recent guidance concerning the collateral-order and state-action doctrines. No Circuit has adopted the minority view set forth in decisions by the Fifth and Eleventh Circuits in over two decades—and none is likely to, because that view is inconsistent with recent cases from this Court. On the other hand, one of the two minority Circuits, the Fifth Circuit, has already taken significant steps toward correcting its jurisprudence, and this Court's recent decisions should provide the additional guidance needed for the split to fully self-correct.

A. No Decision in the Past Two Decades Supports SRP's Position

With its decision below, the Ninth Circuit joined the Fourth and Sixth Circuits in the majority view that the denial of state-action protection is not

immediately appealable. In *Huron Valley Hospital, Inc. v. City of Pontiac*, 792 F.2d 563 (6th Cir. 1986), the Sixth Circuit concluded that a denial of state-action immunity did not meet the second and third requirements of the collateral-order test. *Huron Valley* analyzed the limited set of orders that support interlocutory jurisdiction, some of which involve "immunities." *Id.* at 568. *Huron Valley* concluded that, unlike the immunities from suit that justify an interlocutory appeal, the state-action doctrine is "not an 'entitlement' of the same magnitude" as qualified and absolute immunity and that it was "doubtful that the exemption" of state-action immunity "is lost if immediate appeal is denied." *Id.* at 567. Instead, state-action "immunity" is "more akin to a defense of the original claim" and that "[r]eview of the denial on direct appeal after further development of the record certainly affords the necessary protection if the defense is valid." *Id.* The court also concluded that state-action decisions are not completely separate from the merits, observing that the state-action requirements are "intimately intertwined with the ultimate determination that anticompetitive conduct has occurred." *Id.*

The Fourth Circuit agreed with *Huron Valley* in *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006). The Fourth Circuit analyzed each class of immunities this Court had decided were properly classified as being "effectively unreviewable" after trial. *Id.* at 444. Those immunities are (1) absolute immunity, (2) qualified immunity, (3) Eleventh Amendment sovereign immunity, and (4) the

protections of the Double Jeopardy Clause. *Id.* (citations omitted). In contrast to those immunities from suit, the state-action doctrine "did not arise from any concern about special harms that would result from trial," and "speaks only about the proper interpretation of the Sherman Act"—so the issue was effectively reviewable after trial. *Id.* at 444-445. The Fourth Circuit also concluded that the second and third requirements of the collateral-order doctrine were not satisfied. *Id.* at 441-47.

On the other hand, the Eleventh Circuit in 1986 held state-action denials were immediately appealable. *Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286, 1289-90 (11th Cir. 1986). The *Commuter Transportation* case articulates no reasoning except the unexamined observation that "immunity" has been used to describe the antitrust state-action doctrine and, therefore it must be an immunity from suit. *See id.* No court repeated the Eleventh Circuit's error until the Fifth Circuit's *Martin* decision ten years later. *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391 (5th Cir. 1996).

Just three years after *Martin*, however, the Fifth Circuit, *en banc* and speaking unanimously through Judge Higginbotham, undercut *Martin*'s main premise by explaining that it is "inapt" to call the state-action doctrine an "immunity" because it "differs from the qualified and absolute immunities of public officials." *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Par.*,

171 F.3d 231, 234 (5th Cir. 1999) (en banc). The opinion continues,

> While thus a convenient shorthand, "*Parker* immunity" is more accurately a strict standard for locating the reach of the Sherman Act than the judicial creation of a defense to liability for its violation. The price of the shorthand of using similar labels for distinct concepts is the risk of erroneous migrations of principles.

Id. The next year, a Fifth Circuit panel heeded that admonition and narrowed *Martin*, holding that private-entity defendants may not invoke the collateral-order doctrine to appeal an order denying a state-action defense. *Acoustic Systems v. Wenger*, 207 F.3d 287, 293-94 (5th Cir. 2000).

In 2013 the Tenth Circuit declined to hear an interlocutory appeal on the state-action doctrine. *Auraria Student Housing at the Regency, LLC v. Campus Village Apartments, LLC*, 703 F.3d 1147 (10th Cir. 2013). The defendant in *Auraria* was a private entity, and the Tenth Circuit ruled that a private-entity defendant cannot immediately appeal state-action doctrine denials, and refrained from reaching a broader holding at that time. *Id.* at 1151, 1153.

The Ninth Circuit's opinion in this case builds on the Fourth Circuit's reasoning. *First*, the Ninth Circuit noted three "specific incongruities" between state-action immunity and those limited immunities from suit that this Court has identified, concluding that these "discrepancies suggest that state-action

immunity should not be treated the same as absolute, qualified, or Eleventh Amendment immunity."[1] Pet. App. 14a-15a. *Second*, the Ninth Circuit noted that this Court's more recent decisions have placed "emphasis on the narrowness of the collateral-order doctrine." *Id.* at 16a-17a.

B. This Case Does Not Require Resolving A Circuit Split

As discussed above, SRP is "essentially" a "business enterprise[]" that serves private for-profit interests. In light of those circumstances, five Circuits—every one that has analyzed the issue—agree that this appeal would have to be dismissed. *Huron*, 792 F.2d 563 (Sixth Circuit); *S.C. State Bd.*, 455 F.3d 436 (Fourth Circuit); *Auraria Student Housing*, 703 F.3d 1147 (Tenth Circuit); *Acoustic*

---

[1] These incongruities are: "First, municipalities may invoke state-action immunity, but they may not rely on qualified or Eleventh Amendment immunity." Pet App. 15a (citations omitted). "Second, the state-action doctrine bars 'all antitrust actions, regardless of the relief sought,' but qualified and sovereign immunities do not prevent suits for certain prospective relief." *Id.* (citations omitted). "[T]hird, an antitrust defendant can invoke state-action immunity even in a lawsuit by the United States," something that, by contrast a state cannot do with the sovereign immunity defense. *Id.* (citations omitted).

Systems, 207 F.3d 287 (Fifth Circuit); Pet. App. 1a-17a (Ninth Circuit).

C. The Broader Circuit Split Identified by Petitioner Is Narrow And Self-Correcting

Even putting aside that no court has applied the collateral-order doctrine to the putative state-action doctrine defense of a defendant such as SRP, this Court's recent decisions will hasten the self-correction of the split that SRP identifies as to true state actors.

Panels from four different Circuits have now addressed interlocutory appeals on the state-action doctrine since this Court's decision in *Will*, and each of those panels has declined jurisdiction. *Auraria*, 703 F.3d at 1151-53 (Tenth Circuit) (no interlocutory appeal for private defendants; avoiding the Circuit split by ruling on that narrow ground); *S.C. State Bd.*, 455 F.3d at 441, 445 (Fourth Circuit) (the state-action doctrine's history and nature demonstrates that it is not an immunity from suit, and state-action decisions cannot satisfy any of the three collateral-order doctrine requirements); *Acoustic Systems*, 207 F.3d at 293-94 (Fifth Circuit) (distinguishing Fifth Circuit's prior panel decision that permitted interlocutory appeals as applying only to government-entity defendants; denying private defendants interlocutory state-action appeals); Pet. App. 1a-17a (Ninth Circuit).

SRP cites the Fifth Circuit's denial of interlocutory review in *Acoustic Systems* for the proposition that the Fifth Circuit still views *Martin*

as controlling. Pet. 16. But *Acoustic Systems'* failure to formally overrule *Martin* does not support Petitioner here. The broader context of *Acoustic Systems* is critical: the Fifth Circuit declined to hear the interlocutory appeal in that case and substantially narrowed *Martin*. Moreover, since *Acoustic Systems*, this Court has issued nearly two full decades of opinions on the state-action and collateral-order doctrines that only deepen the Court's "emphasis on the narrowness of the collateral-order doctrine"—an emphasis that "has grown stronger" over time. Pet. App. 17a (citations omitted).

The state-action doctrine has been similarly reined in. Twice in the past three years this Court has corrected lower court decisions that applied state-action protection too liberally. *Phoebe Putney*, 568 U.S. at 227-28, 236; *N.C. State Bd.*, 135 S. Ct. 1101. Those decisions explain that the state-action doctrine is "narrow" and contrary to "fundamental" national policies, and must not permit entrenched private interests to exclude competition. *Phoebe Putney*, 568 U.S. at 2256-26. These decisions are inconsistent with the view that the state-action doctrine is an immunity from suit on the level of Eleventh Amendment or qualified immunity.

SRP's petition asks this Court to take up the collateral-order and state-action doctrines, without providing the minority Circuits an opportunity to revisit and correct their holdings in light of the consistent authority that undercuts their position. For example, SRP says that the Eleventh Circuit has

"adhered" to its erroneous ruling. Pet. 11-12. However, SRP identifies only a single Eleventh Circuit case within the past 20 years where that Circuit "adhered" to its rule—and that case involved a county in 2010. *Id.* Thus, the Eleventh Circuit has not yet had the chance to correct itself in light of *Phoebe Putney* and *North Carolina State Board* or limit its error to certain types of defendants as the Fifth Circuit did in *Acoustic Systems*. The Eleventh Circuit's cases therefore say nothing about how the Circuit will respond either to this Court's recent precedent or to the Circuits that have consistently held in the past two decades that decisions relating to the state-action doctrine fail to satisfy the stringent standard for collateral-order review.

SRP points to two collateral-order doctrine cases where this Court has found appellate jurisdiction in recent years, suggesting that the Circuits may look to these cases as reasons not to self-correct. Pet. 16-17. But neither of those decisions expands the traditional bounds of the collateral-order doctrine. One case permitted interlocutory appeal of decisions under a federal statute expressly providing absolute immunity to federal employees from common-law tort claims arising out of acts they undertake in the course of their official duties. *Osborn v. Haley*, 549 U.S. 225 (2007). An "absolute immunity" explicitly enacted by Congress is a much smaller step from the absolute immunity claims that traditionally satisfy the collateral-order doctrine. *Will*, 546 U.S. at 349-53. The other case SRP cites permitted immediate appeal by an involuntarily confined patient who

would otherwise have forcibly been medicated. *See Sell v. United States*, 539 U.S. 166 (2003). Similar to Double Jeopardy, *Sell* involved a potential direct violation of a fundamental constitutional right, and an issue that cannot wait for an appeal because a bodily invasion cannot be undone. *Id.* at 176-77.

These distinguishable cases do nothing to undermine the import of this Court's recent decisions in *Mohawk* and *Will*, particularly as applied to orders on the repeatedly-narrowed antitrust state-action doctrine. *Mohawk* and *Will* strongly admonish against extending the collateral-order doctrine and enlarging the number of interlocutory appeals. *Mohawk Indus.*, 558 U.S. at 114 (declining to expand the collateral-order doctrine to privilege-wavier orders); *Will*, 546 U.S. at 353-55 (declining to permit interlocutory appeal of the denial of the imposition of the judgment bar in the Tort Claims Act); *see also Swint*, 514 U.S. 35 (declining to permit interlocutory appeal of a denial of a summary judgment motion of a county commissioner that the defendant asserted was not a policymaker for the purposes of liability under 42 U.S.C. § 1983); *Digital Equip. Corp.*, 511 U.S. at 884 (declining to permit interlocutory appeal of a "refusal to enforce a settlement agreement claimed to shelter a party from suit altogether"); *Cunningham v. Hamilton Cnty.*, 527 U.S. 198, 204 (1999) (declining to permit interlocutory appeal of a Rule 37 sanctions order); *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988) (declining to expand the collateral-order doctrine to include orders denying motions to dismiss on the

grounds that an extradited person is immune from civil process on *forum non conveniens* grounds).

II. This Case Is Not An Appropriate Vehicle For Review Of The Question Presented

This case is not an appropriate vehicle to resolve the question SRP presents for at least four independent reasons.

First, the district court's order does not satisfy the first collateral-order doctrine requirement—that the decision appealed from conclusively determine the disputed question. Because that essential element is not satisfied, there is no reason to go beyond that issue and reach any purported circuit split. *See, e.g.*, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 192-93 (1997) (declining to resolve a multivalent circuit split; resting decision on the narrowest possible ground).

The collateral-order doctrine requires the appealed order to "conclusively determine the disputed question" appealed. *Will*, 546 U.S. at 349-50. Determinations are conclusive when "made with the expectation that they will be the final word on the subject addressed." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277 (1985) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 n.14 (1983)). For example, denials of qualified immunity—which ordinarily unquestionably qualify for immediate appeal—are not appealable when they rest on facts that could permit immunity at a later stage because, in those circumstances, the applicability of qualified

immunity has not been conclusively determined. *Johnson v. Jones*, 515 U.S. 304, 307 (1995); *Ortiz v. Jordan*, 562 U.S. 180, 190-91 (2011).

Here, the district court addressed the state-action doctrine only at the pleading stage and anticipated that the question would be raised again with a developed factual record. Pet. App. 65a-66a, 67a. If that were not plain enough, the Court later invited SRP to "raise these immunities at summary judgment." *Id.*

Second, even if the Court were to conclude that the district court's motion to dismiss decision on the state-action doctrine were a collateral order subject to interlocutory appeal, a decision in SRP's favor would not allow SRP to avoid litigation on the antitrust merits. This is so because SolarCity asserts both federal and state antitrust claims, as well as a state tort claim. No resolution of SRP's state-action defense could immunize against SolarCity's state antitrust claims, and a trial in this case under state antitrust law would look no different than one under the federal antitrust laws.[2]

---

[2] There is both federal question and diversity jurisdiction in this case, so the state claims will proceed in the absence of the federal antitrust claims (the only federal claims in this case). *See* ER55 at ¶ 44.

SRP's arguments require characterizing the state-action doctrine as an "immunity from suit" on par with sovereign or qualified immunity because the state-action doctrine reflects *federalism* concerns. *See* Pet. at 1, 3, 25-26. But there can be no federalism issue when a plaintiff asserts *state* law against a purported state entity. An Arizona statute, Section 30-813, resolves any doubt by expressly subjecting SRP to state antitrust law:

> Notwithstanding any other law, the provisions of title 44, chapter 10, article 1 [the Uniform State Antitrust Act as enacted by Arizona], apply to the provisions of competitive electric generation service or other services by public power entities.

Further, because the state-action doctrine is justified by inferring a statutory exception from legislative silence, Section 30-813's clear policy in favor of antitrust enforcement against SRP means there is no basis to apply *Parker*'s inference from legislative silence to Arizona state law. *See Parker*, 317 U.S. at 351. To do so would in fact contravene Arizona's stated intent that SRP should be held accountable to state antitrust law.

SRP's petition anticipates its justiciability problem by discussing a Ninth Circuit opinion that said Arizona would likely apply the state-action doctrine in a different context—where there was no statute such as Section 30-813 that approved antitrust enforcement concerning the market at issue. *Mothershed v. Justices of the Supreme Court*,

410 F.3d 602 (9th Cir. 2005); Pet. at 23-24. But no court below addressed the *Mothershed* issue, Arizona state law is not appropriately before this Court, and *Mothershed* is both indefensible as a matter of logic (it makes no sense to apply a doctrine rooted in federalism concerns to state law claims against an entity like SRP) and outdated because it lacked this Court's guidance in *Phoebe Putney* and *North Carolina State Board*.

Third, SRP itself contends that the state-action doctrine's protection will be "irredeemably lost" as soon as a case proceeds past a motion to dismiss, Pet. at 2-3. Discovery ended in this case and the parties filed motions for summary judgment a year ago. D. Ariz. ECF No. 208, 210. Thus, according to SRP's petition, the burden that makes the state-action doctrine "effectively unreviewable" is not present on the facts of its case.

III. The Decision Below Is Correct

The decision below is fully consistent with this Court's precedents addressing the narrow subset of orders subject to collateral-order review. There is therefore no need for this Court's intervention.

First, the appealed order did not conclusively resolve any state-action doctrine issue. Determinations are conclusive when "made with the expectation that they will be the final word on the subject addressed." *Gulfstream*, 485 U.S. at 277. Here, the district court expressly anticipated that SRP would and could raise the issue again at summary judgment or another merits stage. Pet.

App. 65a-66a, 67a; *see also* Pet. App. 33a n.7 ("The District is free to raise these immunities at summary judgment.").

Second, the state-action doctrine is not completely separate from the merits of the claims at issue—a requirement for collateral-order review. For the state-action doctrine to apply, SRP must first show that the state has "clearly articulated and affirmatively expressed" a policy "to allow the anticompetitive conduct." *N.C. State Bd.*, 135 S. Ct. at 1110, 1112 (internal quotation marks omitted). To satisfy the clear articulation test, "the State must have affirmatively contemplated the displacement of competition such that the challenged anticompetitive effects can be attributed to the 'state itself.'" *Phoebe Putney*, 568 U.S. at 229 (quoting *Parker*, 317 U.S. at 352).[3] Next, because of its structure, SRP is likely to pursue private interests. *Id.* SRP must show that it is "actively supervised" by the state itself. *Id.* at 1110.[4]

---

[3] SRP is not sovereign and its actions are not those of "the state itself." Even "state agencies," which have a far stronger claim to sovereignty than SRP, do not meet that standard. *N.C. State Bd.*, 135 S. Ct. at 1111.

[4] SRP focuses on recitals in Arizona's state constitution and statutes, but state-law labels do not control the federal antitrust inquiry, which turns on the state-action doctrine's

"The analysis necessary to determine whether clearly articulated or affirmatively expressed state policy is involved and whether the state actively supervises the anticompetitive conduct" is "intimately intertwined with the ultimate determination that anticompetitive conduct has occurred." *Huron Valley Hosp.*, 792 F.2d at 567; *see also S.C. State Bd.*, 455 F.3d at 442-43 (whether state-action immunity applies is "inherently 'enmeshed' with the underlying cause of action"). For example, whether the conduct was the type the state approved and foresaw may turn on disputed facts about what conduct occurred. Similarly, "clear articulation" may require factual inquiries concerning whether the defendant acted like a "market participant." *A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.*, 263 F.3d 239, 265 n.55 (3d Cir. 2001). If the entity's conduct was that of a private economic actor "in a proprietary activity," then it is unlikely the state authorized such conduct to supersede the antitrust laws. *See* Areeda & Hovenkamp, Antitrust Law, ¶ 224e (4th ed. 2014); *see also N.C. State Bd.*, 135 S. Ct. at 1114. Here, the

---

substantive test. As this Court put it in *North Carolina State Board*, "the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade." 135 S. Ct. at 1114.

challenged action did not involve an exercise of sovereign power, but was a proprietary activity undertaken for profit. *See Ball*, 451 U.S. at 368; *City of Mesa*, 92 Ariz. at 100. For similar reasons, as explained above, this Court's recent *North Carolina State Board* decision shows that some nominally "state" entities will have to show that they are actively supervised—a necessarily factual showing. 35 S. Ct. at 1111-12.

In addition, a claim of immunity—even a true immunity that protects a party from suit—cannot be conclusively resolved on a motion to dismiss if disputed factual issues remain. *See, e.g.*, *Johnson*, 515 U.S. at 319-20 (holding that the collateral-order doctrine does not permit an immediate appeal of a district court's denial of qualified immunity when the district court concluded there were disputed issues of material fact); *Ortiz*, 562 U.S. at 190-91 (denial of qualified immunity not appealable unless it turns on a "purely legal issue" or "neat abstract issues of law"). Factual issues may remain after initial denials of state-action protection because demonstrating active supervision hinges on a functional analysis of the putative state actor's incentives to serve private—rather than public—interests. *S.C. State Bd.*, 455 F.3d at 441-42. SRP concedes the point, admitting that "where a claim of state-action immunity turns on factual questions, the requisite separateness may not be present." Pet. 34.

Third, SRP cannot show that the state-action doctrine is the kind of right to be exempted from the judicial process that is "effectively unreviewable"

after final judgment. It is not enough for a decision to deny "a claim of right to prevail without trial." *Will*, 546 U.S. at 349-51. Instead, SRP must identify a right not to be tried or subjected to the judicial process at all. *Id.*; *Digital Equip. Corp.*, 511 U.S. at 873 (cautioning against characterizing "every right that could be enforced appropriately by pretrial dismissal" as "conferring a 'right not to stand trial'" and therefore subject to immediate appeal under the collateral-order doctrine). The right's scope, origin, and purpose must be scrutinized; superficial analogies to orders previously held to satisfy the collateral-order doctrine are not enough. *See Will*, 546 U.S. at 350-51 (warning against "the lawyer's temptation to generalize").

The state-action doctrine's provenance shows that it is not an immunity from suit. It is an exception read into a statute that facially applies to all state actors. *See Phoebe Putney*, 568 U.S. at 224-25. Federalism concerns also animate the doctrine, but these are balanced by the competing interests in favor of free and unfettered interstate commerce and against "parochial" favoritism. *N.C. State Bd.*, 135 S. Ct. at 1112-13. SRP says that "officials" will be threatened, but no individual "official" is named and the law already balances concerns about burdening officials with qualified immunity. *E.g.*, Pet. 28. In short, there is no reason that SRP, a business enterprise that exists to benefit certain private landholders for their "personal profit", *Local 266*, 78 Ariz. at 44, cannot withstand the burden and expense of an antitrust trial. Similarly, the

sovereignty and federalism principles that SRP claims are embodied in the Eleventh Amendment, which denies SRP sovereign protection (consistent with this Court's observation that SRP's electricity business is not a traditional incident of state sovereignty, *Ball*, 451 U.S. at 367-68). Thus, SRP argues that the state-action doctrine creates a right the Constitution itself denies SRP. That is a tall order for a "disfavored" and narrow statutory inference.

SRP's view has no principled bounds. Constitutional principles inform many doctrines that are not immunities. For instance, the *Noerr-Pennington* doctrine is a tool of antitrust statutory interpretation, just like the state-action doctrine. Pet App. at 10a (discussing *Nunag-Tanedo v. East Baton Rouge Parish School Bd.*, 711 F.3d 1136, 1140 (9th Cir. 2013)). *Noerr-Pennington* derives from First Amendment concerns, much as federalism informed the state-action doctrine. *Id.* Under SRP's view, the only reason *Noerr-Pennington* "immunity" is not immediately appealable is an assumption that structural principles are inherently worthier than an individual liberty on which our country is founded. Pet. at 28 n.7. Similarly, orders denying Double Jeopardy motions are immediately appealable because that Clause is a right not to be subjected to the peril of a trial, that is, not to be tried at all. *Abney v. United States*, 431 U.S. 651, 660 (1977). By contrast, a denied motion to disqualify counsel may subject a criminal defendant to an unconstitutional trial and keep an innocent incarcerated as the legal

process plays out, but that does not support an immediate appeal. *Flanagan v. United States*, 465 U.S. 259, 266-68 (1984).

IV. A Stay Of This Action For Any Reason Is Unwarranted

SRP's petition also invites the Court to stay the case without its making a motion to stay. A stay is unnecessary and unwarranted for the foregoing reasons. In addition, there is no irreparable harm to SRP. SRP seeks only to avoid the expense and inconvenience of a trial. Even if a decision in this Court could let SRP avoid a full antitrust trial, merely avoiding a trial and sparing inconvenience for its employees cannot justify interfering with the ordinary course of litigation. *Will*, 546 U.S. at 353.

By contrast, antitrust enforcement benefits electric customers and the public interest, and prevents irreparable harm to competition. *See Otter Tail Power Co.*, 410 U.S. at 374; *see also California v. Am. Stores Co.*, 492 U.S. 1301 (O'Connor, Circuit Justice 1989) (granting the State of California's request for a stay of an appellate decision that would dissolve a preliminary injunction enjoining a merger because the risk of anticompetitive effects and reduction of competition that could occur in the absence of an injunction could cause irreparable harm to consumers). This is particularly important here because SRP's conduct has drastically curtailed, if not eliminated altogether, the installation of distributed solar in one of the sunniest markets in the nation. Am. Compl. ¶¶ 7, 123 (ER48, ER71).

CONCLUSION

SRP's petition for a writ of certiorari should be denied.

Respectfully submitted,

STEVEN C. HOLTZMAN
SEAN P. RODRIGUEZ
BOIES SCHILLER FLEXNER LLP
1999 Harrison St., Suite 900
Oakland, CA 94612
(510) 874-1000

KEITH BEAUCHAMP
ROOPALI H. DESAI
COPPERSMITH BROCKELMAN PLC
2800 N. Central Avenue, Suite 1200
Phoenix, AZ 85004
(602) 224-0999

RICHARD A. FEINSTEIN
Counsel of Record
WILLIAM A. ISAACSON
KAREN L. DUNN
AMY J. MAUSER
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, N.W.
Washington, D.C. 20005
(202) 237-6131
rfeinstein@bsfllp.com

JOHN F. COVE, JR.
SHEARMAN & STERLING LLP
535 Mission Street, 25th Floor
San Francisco, CA 94105

October 11, 2017

FILED
OCT 31 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 17-368

IN THE

Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Petitioner,

v.

SOLARCITY CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

CHRISTOPHER E. BABBITT
DANIEL S. VOLCHOK
DAVID GRINGER
DANIEL WINIK
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

MOLLY S. BOAST
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
molly.boast@wilmerhale.com

CHRISTOPHER T. CASAMASSIMA
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 S. Grand Avenue
Los Angeles, CA 90071
(213) 443-5300

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THIS CASE IMPLICATES THE ENTRENCHED CIRCUIT CONFLICT THAT SOLARCITY ACKNOWLEDGES 1

II. THE CIRCUIT CONFLICT WILL NOT RESOLVE ITSELF 4

III. SOLARCITY IDENTIFIES NO BARRIER TO RESOLVING THE CIRCUIT CONFLICT HERE 6

IV. THE DECISION BELOW IS WRONG 9

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Page(s)

Acoustic Systems, Inc. v. *Wenger Corp.*, 207 F.3d 287 (5th Cir. 2000) 6

Auraria Student Housing at the Regency, LLC v. *Campus Village Apartments, LLC*, 703 F.3d 1147 (10th Cir. 2013) 2

Ball v. *James*, 451 U.S. 355 (1981) 3

Bell Atlantic Corp. v. *Twombly*, 550 U.S. 544 (2007) 12

Commuter Transportation Systems, Inc. v. *Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986) 4, 5, 11

Danner Construction Co. v. *Hillsborough County*, 608 F.3d 809 (11th Cir. 2010) 4

FTC v. *Phoebe Putney Health System, Inc.*, 568 U.S. 216 (2013) 5

FTC v. *Ticor Title Insurance Co.*, 504 U.S. 621 (1992) 5

Gulfsiream Aerospace Corp. v. *Mayacamas Corp.*, 485 U.S. 271 (1988) 7

Martin v. *Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996) 6

Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 10, 11

Mothershed v. *Justices of the Supreme Court*, 410 F.3d 602 (9th Cir. 2005) 8

North Carolina State Board of Dental Examiners v. *FTC*, 135 S. Ct. 1101 (2015) 5, 11

TABLE OF AUTHORITIES—Continued

Page(s)

Salyer Land Co. v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973) 3

Salt River Project Agricultural Improvement & Power District v. *City of Phoenix*, 631 P.2d 553 (Ariz. Ct. App. 1981) 2

Smith v. *Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586 (9th Cir. 1997) 3

CONSTITUTIONAL AND STATUTORY PROVISIONS

Ariz. Const. art. XIII, §7 2

Ariz. Rev. Stat.
§30-813 8
§48-247 8
§48-2302 2

OTHER AUTHORITIES

Areeda, Phillip E. & Herbert Hovenkamp, *Fundamentals of Antitrust Law* §2.04[B] (4th ed. & 2015 Supp.) 11

IN THE

Supreme Court of the United States

No. 17-368

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Petitioner,

v.

SOLARCITY CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

SolarCity agrees that the courts of appeals are avowedly divided about whether public entities can immediately appeal denials of state-action immunity. And it never disputes that question's importance. It nonetheless urges this Court to decline to resolve the division. Its arguments for doing so lack merit.

ARGUMENT

I. THIS CASE IMPLICATES THE ENTRENCHED CIRCUIT CONFLICT THAT SOLARCITY ACKNOWLEDGES

SolarCity asserts (Opp. 6-9, 17-18) that although there is a mature circuit conflict over the question presented, that conflict is not implicated here because the District (SolarCity claims) is a private entity, not pub-

lic. That claim defies Arizona law, this Court's precedent, and the decision below.[1]

1. Under Arizona law, the District and similar entities are "public, political ... subdivision[s] of the state," Ariz. Rev. Stat. §48-2302, "vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted[,] ... political subdivisions," Ariz. Const. art. XIII, §7. Accordingly, Arizona courts have rejected SolarCity's argument that the District is private, holding that "[t]he fact that the Salt River Project sells surplus power as a revenue source in its proprietary capacity does not defeat its status as a ... political subdivision of the state." *Salt River Project Agricultural Improvement & Power District* v. *City of Phoenix*, 631 P.2d 553, 555 (Ariz. Ct. App. 1981) (citing Arizona Supreme Court precedent). That holding recognizes that even when acting in a proprietary capacity, public utilities are—as amici here confirm (Br. 4-10)—serving essential public purposes.

SolarCity's footnoted response (Opp. 26-27 n.4) is that "state-law labels do not control the federal antitrust inquiry." But unlike in the case SolarCity cites, the state here has not merely employed a label. Rather, Arizona's constitution, as noted, confers substantive rights and immunities on the District. Arizona's legislature has also given the District significant governmental powers, authorizing it to "establish and enforce laws, rules and regulations necessary to carry on the District's business, construct works for irrigation,

---

[1] In any event, contrary to SolarCity's assertion (Opp. 2), there is a circuit conflict even as to immediate appeals by private entities. *See Auraria Student Housing at the Regency, LLC* v. *Campus Village Apartments, LLC*, 703 F.3d 1147, 1151 (10th Cir. 2013).

drainage, and power, levy taxes on real property within the District, sell tax-exempt bonds, and exercise the power of eminent domain." *Smith* v. *Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586, 589 (9th Cir. 1997) (citing relevant statutes). SolarCity provides no sound basis for this Court to hold the District to be private notwithstanding these constitutional and statutory provisions, as well as decades of Arizona cases interpreting them—cases that SolarCity recognizes are pertinent to the analysis, as its own arguments repeatedly cite them (Opp. 7, 8, 27).

2. Were there any remaining doubt about the District's public character, it would be dispelled by *Ball* v. *James*, 451 U.S. 355 (1981). There the Court, despite fully understanding the District's proprietary functions (which it analyzed in detail), described the District as a "governmental body," "a governmental entity," and a "public entity." *Id.* at 357. And critically, the Court did not hold the District exempt from the Equal Protection Clause, as a private entity would be. Rather, the Court subjected the District to the equal-protection standard set forth in *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973). *See Ball*, 451 U.S. at 362-371. Although the petition explained this dispositive point (at 18-19), SolarCity simply ignores it.

3. Not surprisingly given the foregoing, the Ninth Circuit rejected SolarCity's argument that the District is private, resting its decision on the premise that the District is a "a political subdivision of Arizona." Pet. App. 3a. That is why the court stated that its ruling accorded or conflicted with decisions of four other circuits *that involved public entities*. Pet. App. 14a-17a. SolarCity's effort to revive arguments rejected by the decision below underscores the infirmity of its claim that the question presented is not implicated here.

II. THE CIRCUIT CONFLICT WILL NOT RESOLVE ITSELF

SolarCity contends (Opp. 13) that even if this case implicates the circuit conflict over whether public entities can immediately appeal denials of state-action immunity, certiorari is unwarranted because the conflict "is ... on its way to resolving itself based on this Court's more recent guidance concerning the collateral-order and state-action[-immunity] doctrines." That is wishful thinking.

To begin with, as was true below (*see* Pet. 15), SolarCity cites nothing here (no opinion suggesting the need for en banc review, no dissent from a rehearing denial, not even a call for an en banc vote) suggesting the Eleventh Circuit will revisit its holding in *Commuter Transportation Systems, Inc.* v. *Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986), that denials of state-action immunity to public entities are immediately appealable. Nor does SolarCity deny that, as the petition explained (at 15), the Eleventh Circuit adhered to that holding in *Danner Construction Co.* v. *Hillsborough County*, 608 F.3d 809 (11th Cir. 2010)—which was decided *after* every one of the collateral-order rulings from this Court that SolarCity claims (Opp. 4, 21-22) will lead to the circuit conflict resolving itself.[2]

SolarCity is therefore reduced to speculating (Opp. 20) that the Eleventh Circuit might revisit its *collateral-order* precedent because of this Court's post-2010 *state-action-immunity* decisions. Even putting aside the implausibility of such a cross-doctrinal effect, noth-

---

[2] *Danner*'s adherence to *Commuter Transportation* is unsurprising, because this Court's recent collateral-order decisions did not change the doctrine. *See* Pet. 17.

ing in the decisions SolarCity invokes—*North Carolina State Board of Dental Examiners* v. *FTC*, 135 S. Ct. 1101 (2015), and *FTC* v. *Phoebe Putney Health System, Inc.*, 568 U.S. 216 (2013)—meaningfully changed the state-action-immunity doctrine. Indeed, what SolarCity apparently views as the sea change in those cases, namely the notion that state-action immunity is "disfavored" (Opp. 3, 5, 30), actually dates to 1992, long before the Eleventh Circuit reaffirmed *Commuter Transportation* in 2010. *See FTC* v. *Ticor Title Insurance Co.*, 504 U.S. 621, 636 (1992). Both *North Carolina State Board* and *Phoebe Putney* reiterated, moreover, that state-action immunity rests on state sovereignty and federalism, *see* 135 S. Ct. at 1110; 568 U.S. at 224, 236—which is the same reason that the Eleventh Circuit deemed denials of state-action immunity immediately appealable, *see Commuter Transportation*, 801 F.2d at 1289. There is thus no basis to conclude that this Court's recent decisions will induce any rethinking by that circuit.

SolarCity next asserts (Opp. 20) that the Eleventh Circuit might overrule its precedent because of other circuits' decisions. That is likewise highly improbable. All of those decisions (save the decision below, which largely tracked other courts' analysis of the question presented) predate *Danner*, when the Eleventh Circuit, as noted, stood by its precedent.[3]

Although the foregoing suffices to reject SolarCity's claim that the circuit conflict will resolve itself—because SolarCity does not dispute that having even one circuit in conflict with others would warrant certio-

---

[3] *Danner* also belies SolarCity's repeated claim (*e.g.*, Opp. 13) that "No Decision in the Past Two Decades Supports SRP's Position."

rari (*see* Pet. 15)—SolarCity's arguments regarding the Fifth Circuit are equally flawed. In particular, SolarCity attempts to make lemonade out of lemons when discussing *Acoustic Systems, Inc.* v. *Wenger Corp.*, 207 F.3d 287 (5th Cir. 2000), which *adhered* to *Martin* v. *Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996). SolarCity claims (Opp. 19) that *Acoustic Systems* actually "narrowed" *Martin*'s holding that denials of state-action immunity to public entities are immediately appealable. But as SolarCity acknowledges (Opp. 16), *Acoustic Systems* did so only in that it declined to extend *Martin* to private defendants. That does not change the crucial fact (which SolarCity never denies) that *Acoustic Systems* adhered to *Martin* regarding public defendants.

Put simply, it is exceedingly unlikely that the Fifth and Eleventh Circuits, having made no move to date to revisit their decades-old precedent, will both suddenly take the rare step of convening en banc to do so—particularly because this Court's recent collateral-order and state-action-immunity decisions broke no new ground, and because neither court could by itself eliminate the circuit conflict via en banc proceedings.

III. SolarCity Identifies No Barrier To Resolving The Circuit Conflict Here

SolarCity contends (Opp. 22-25) that this is a poor vehicle to answer the question presented, for three reasons. (A promised "four[th] independent reason[]" (Opp. 22) is never given.) All three are unpersuasive, but regardless, none is actually a vehicle problem, as

none could prevent the Court from deciding the question presented.[4]

1. SolarCity asserts (Opp. 22-23) that the district court's denial of state-action immunity does not satisfy the collateral-order doctrine's requirement that the denial be conclusive. But that is not a vehicle problem; it is a component of the question presented (one fully briefed below and addressed by other circuits, *see* Pet. 23). SolarCity itself confirms this, by including conclusiveness in its merits arguments (Opp. 25-26). Hence, while conclusiveness could in theory be a reason to affirm—though it isn't, as explained immediately below—it is not a reason to deny certiorari, and certainly not a reason this Court would be prevented from deciding the question presented if it granted review.

That aside, SolarCity errs in claiming that the order here is not conclusive. The basis for that claim—SolarCity's suggestion that the district court might revisit the order—is irrelevant to conclusiveness. What matters is not whether a particular judge might revisit one particular denial order, but rather whether "a district court *ordinarily* would expect to reassess and revise" the type of order in question. *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 277 (1988) (emphasis added). As the petition explained (at 31-32), orders denying state-action immunity do not satisfy that standard, certainly where (as here) immun-

---

[4] SolarCity rightly does not argue that this case could be moot before the Court could decide it. As the petition explained (at 24), that argument would fail. In any event, as the petition also stated (at 24-25), if certiorari is granted this Court could—to eliminate any concern about mootness—stay further district-court proceedings, either *sua sponte* or on an application the District would file if the lower courts denied a stay.

ity is denied on legal rather than (as SolarCity wrongly implies (Opp. 23)) factual grounds.

2. SolarCity next contends (Opp. 23) that a reversal here would not "allow SRP to avoid [this] litigation" entirely, because state-action immunity supposedly would not bar SolarCity's state-law antitrust claims. But again, even if correct, that would not bar this Court from answering the question presented.

At any rate, the argument is incorrect. As the petition explained (at 23), the Ninth Circuit held in *Mothershed* v. *Justices of the Supreme Court*, 410 F.3d 602, 609 (9th Cir. 2005), that Arizona antitrust law tracks federal law and thus incorporates state-action immunity. SolarCity suggests (Opp. 24-25) that *Mothershed* is inapplicable here because a statutory provision states that Arizona's antitrust law "appl[ies] to the provisions of competitive electric generation service or other services by public power entities." Ariz. Rev. Stat. §30-813. But that provision does not help SolarCity because—as *Mothershed* held—Arizona's antitrust law (like its federal counterpart) *includes* the state-action-immunity doctrine.

SolarCity also argues (Opp. 25) that "*Mothershed* is both indefensible as a matter of logic ... and outdated." As the District explained below, that is wrong. *See* C.A. Dkt. 89 at 4-5 (July 3, 2017). Indeed, by statute, Arizona's antitrust law does not apply to District activity "approved by a statute of this state." Ariz. Rev. Stat. §48-247. But regardless, *Mothershed* is indisputably binding Ninth Circuit precedent—and hence would require dismissal of SolarCity's Arizona antitrust claim if the District were ultimately held to have state-action immunity. To the extent SolarCity is suggesting that this Court could abrogate *Mothershed* here, that is

wrong for reasons SolarCity itself gives (Opp. 25), i.e., that "no court below addressed ... *Mothershed*" and "Arizona state law is not appropriately before this Court."

3. SolarCity asserts (Opp. 25) that because the petition stated (at 2-3) that state-action immunity is "irredeemably lost" once a public entity is "subjected to the burdens of litigation beyond a motion to dismiss," the District—having litigated past that point here—must have no continuing interest requiring vindication by this Court.

Respectfully, that argument borders on silly. The point plainly being made in the passage SolarCity quotes (as in the rest of the petition) is that denials of state-action immunity are effectively unreviewable after final judgment for the same reason that denials of sovereign and qualified immunity are, namely that getting to final judgment requires enduring "months or years of burdensome or intrusive litigation" (Pet. 30), by which point the immunity has been lost because it is an immunity from suit and not just from liability. This Court has never held that any litigation beyond the motion-to-dismiss stage prevents an interlocutory appeal of a denial of qualified or sovereign immunity, and SolarCity does not even try to defend such an approach here. Its resort to mischaracterizing the District's straightforward argument in hopes of creating the illusion of a vehicle problem is telling.

IV. THE DECISION BELOW IS WRONG

SolarCity asserts that review is unwarranted because the decision below is correct. That would not justify denying certiorari even if true, given the acknowl-

edged circuit conflict and the undisputed importance of the question presented. But it is not true.

First, SolarCity argues (Opp. 25-26) that "the appealed order did not conclusively resolve any state-action doctrine issue." That is wrong for the reasons discussed above (at 7-8) and in the petition (at 31-32).[5]

Second, SolarCity asserts (Opp. 26-28) that "the state-action doctrine is not completely separate from the merits of [SolarCity's] claims." It bases that argument partly on the notion that any factual disputes relevant to state-action immunity could also bear on the merits. But SolarCity identifies no factual disputes here—not surprisingly given that the district court's ruling was purely legal. Pet. App. 25a-27a. And as the petition explained (at 34), the proper rule in this context is the same one this Court has adopted for qualified immunity: Collateral-order jurisdiction encompasses orders denying immunity as a matter of law, but not those turning on factual issues. *Id.*; Opp. 28. The former class of orders satisfies the separateness requirement.

Disputing this, SolarCity contends (Opp. 26) that to resolve a state-action-immunity claim, a court must consider "the [alleged] anticompetitive conduct" and alleged "anticompetitive effects." This Court has rejected the counterpart to that argument in the qualified-immunity context, holding that "a question of immunity is separate from the merits ... even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue." *Mitchell* v.

---

[5] SolarCity ignores the petition's arguments on this point, as on many others.

Forsyth, 472 U.S. 511, 528-529 (1985); *see also id.* at 529-530 n.10. The same is true here.[6]

Finally, SolarCity ignores the District's explanation (Pet. 33-34) of why this Court's precedent shows that the separateness requirement is met here.

Third, SolarCity argues (Opp. 28-31) that state-action immunity is a defense to liability rather than an immunity from suit, and hence denials of the immunity are effectively reviewable on appeal from final judgment. SolarCity's arguments cannot rehabilitate the Ninth Circuit's faulty reasoning on this point (which, notably, SolarCity's discussion barely even cites).

As an initial matter, SolarCity largely ignores the District's central argument (Pet. 25-30) that state-action immunity is much like sovereign and qualified immunity, denials of which are immediately appealable. Like sovereign immunity, state-action immunity partly reflects "the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *North Carolina State Board*, 135 S. Ct. at 1110. And like qualified immunity, state-action immunity ensures that government local officials can perform their work with an eye toward serving the public rather than avoiding litigation. *Commuter Transportation*, 801 F.2d at 1289; Areeda & Hovenkamp, *Fundamentals of Antitrust Law* §2.04[B], at 2-52 (4th ed. & 2015 Supp.).

SolarCity instead argues (Opp. 29) that "there is no reason that SRP, a business enterprise ..., cannot with-

---

[6] SolarCity also states (Opp. 26) that to enjoy state-action immunity, the District "must show that it is 'actively supervised' by" Arizona. That is wrong because the District is an electorally accountable public entity. Pet. 2 n.1 (citing cases).

stand the burden and expense of an antitrust trial." That flippant statement cannot obscure either the enormous costs of antitrust litigation, *see Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 558 (2007), or the fact that—as amici explain (Br. 16)—ratepayers ultimately bear the costs when public power entities are subjected to litigation. At any rate, it is irrelevant whether the District can "withstand" litigation costs. Many entities (states, for example) could surely withstand the costs of litigation from which they are shielded by sovereign or qualified immunity. The immunities thus do not just protect their beneficiaries from unbearable costs. Rather, they recognize that subjecting public entities to even non-crippling litigation burdens can harm the public.

SolarCity next argues (Opp. 29-30) that the District should enjoy no greater protection under state-action immunity than under sovereign immunity. That is manifestly wrong. Courts routinely apply state-action immunity to public entities that cannot assert sovereign immunity; indeed, the immunity sometimes extends even to private entities. *See* Pet. 2 n.1. If state-action immunity were coterminous with sovereign immunity, it would serve little purpose. Meanwhile, SolarCity offers no response to the District's core point: Denying state-action immunity in these circumstances derogates state sovereignty by infringing states' fundamental prerogative to regulate their economies within their borders how they choose—including by enlisting political subdivisions to do so.

Lastly, SolarCity argues (Opp. 30-31) that the District's "view has no principled bounds," because "[c]onstitutional principles inform many doctrines that are not immunities." That is a strawman, as the District "has never argued ... that any constitutional rul-

ing is immediately appealable." Pet. 26. Its argument is limited to true immunities from suit. That is a clear, simple, and "principled bound[]."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHRISTOPHER E. BABBITT
DANIEL S. VOLCHOK
DAVID GRINGER
DANIEL WINIK
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

MOLLY S. BOAST
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
molly.boast@wilmerhale.com

CHRISTOPHER T. CASAMASSIMA
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 S. Grand Avenue
Los Angeles, CA 90071
(213) 443-5300

OCTOBER 2017

RECORD AND BRIEFS

No. 17-368

Supreme Court, U.S.
FILED
OCT 11 2017
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

v.

SOLARCITY CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMERICAN PUBLIC POWER ASSOCIATION AND LARGE PUBLIC POWER COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JOHN M. BAKER
Counsel of Record
JENNY GASSMAN-PINES
CHRISTOPHER L. SCHMITTER
GREENE ESPEL PLLP
222 S. Ninth Street, Suite 2200
Minneapolis, MN 55402
(612) 373-0830
jbaker@greeneespel.com

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. STATE-ACTION IMMUNITY IS CRITICAL TO PUBLIC POWER UTILITIES' ABILITY TO FOCUS ON THEIR PUBLIC OBJECTIVES 4

A. Public power utilities are governmental entities that serve a public purpose 5

B. Public power utilities provide a broad swath of public services 8

II. WAITING UNTIL THE END OF TRIAL COURT LITIGATION TO APPEAL AND CONCLUSIVELY DETERMINE APPLICABILITY OF STATE-ACTION IMMUNITY UNDERMINES IMMUNITY'S PURPOSE AND HAS NEGATIVE CONSEQUENCES FOR THE PUBLIC 10

A. Requiring participation through trial on all antitrust claims before review of state-action immunity denials undermines the doctrine's purpose of resolving conflicts between federalism and antitrust principles 11

TABLE OF CONTENTS – Continued

Page

B. Delay will have negative consequences for public power utilities, and the public 13

C. The status quo – with some circuits allowing immediate appeal of state-action immunity questions and others not – undermines federal uniformity 17

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 536 F.3d 68 (1st Cir. 2008) 14

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 13, 14, 16

Cmty. Commc'ns Co. v. City of Boulder, Colo., 455 U.S. 40 (1982) 4, 11, 12

Commuter Transp. Sys., Inc. v. Hillsborough Cty. Aviation Auth., 801 F.2d 1286 (11th Cir. 1986) 17

F.T.C. v. Phoebe Putney Health Sys., Inc., 568 U.S. 216 (2013) 5

Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563 (6th Cir. 1986) 17

Johnson v. Princeton Public Utilities Commission, 899 N.W.2d 860 (Minn. Ct. App. 2017) 15

Martin v. Mem'l Hosp. at Gulfport, 86 F.3d 1391 (5th Cir. 1996) 12, 17

N.C. State Bd. of Dental Examiners v. F.T.C., 135 S. Ct. 1101 (2015) ..... *passim*

NLRB v. Natural Gas Utility District of Hawkins County, Tennessee, 402 U.S. 600 (1971) 15

Northwest Austin Municipal Utility District No. One v. Holder, 557 U.S. 193 (2009) 15

TABLE OF AUTHORITIES – Continued

Page

Pac. Gas & Elec. Co. v. Sacramento Mun. Util. Dist., 92 F.2d 365 (9th Cir. 1937) 6

Parker v. Brown, 317 U.S. 341 (1943) 4, 6

S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) 11

S.C. State Bd. of Dentistry v. F.T.C., 455 F.3d 436 (4th Cir. 2006) 17

SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist., 859 F.3d 720 (9th Cir. 2017) 17

State v. City of Austin, 331 S.W.2d 737 (Tex. 1960) 8, 9

STATUTES

16 U.S.C. § 824(a) 8

Sherman Antitrust Act 4, 6

OTHER AUTHORITIES

2015 Governance Survey, Am. Pub. Power Ass'n (May 2015), https://www.csu.org/CSUDocuments/appagovernancesurvey2015.pdf 15

Manual for Complex Litigation, Fourth § 30 (2004) 14

Our Members, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/our-members 5

TABLE OF AUTHORITIES – Continued

Page

Our Members, Large Pub. Power Council (2017), http://www.lppc.org/who-we-are/our-members.....5

Our Services, Coldwater Board of Pub. Utils., http://www.coldwater.org/415/Our-Services (last visited Oct. 5, 2017).....9

Owatonna Pub. Utils., http://www.owatonnautilities.com/ (last visited Oct. 5, 2017).....9

Products & Services, Bowling Green Mun. Utils., http://bgmu.com/residential/t/services-offered (last visited Oct. 5, 2017) 9

Public Power Pays Back, Am. Pub. Power Ass'n (Apr. 2016), http://appanet.files.cms-plus.com//PDFs/PublicPowerPaysBack2014.pdf 7, 13

Public Power, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power 6, 7, 13, 15

Rates, Hastings Utils., https://www.hastingsutilities.com/rates/ (last visited Oct. 5, 2017) 9

Robert A. Skitol and Kennedy M. Vorrasi, *Justice Stevens' Antitrust Legacy*, 24 Antitrust No. 3 (Summer 2010) 14

Roger L. Kemp, Managing America's Cities: A Handbook for Local Government Productivity (2007).....13

Stop, Start, Move Service, Idaho Falls Power, https://www.idahofallsidaho.gov/268/Stop-Start-Move-Service (last visited Oct. 5, 2017) 9

TABLE OF AUTHORITIES – Continued

Page

Water: Facts & Figures, L.A. Dep't of Water & Power, https://www.ladwp.com/ladwp/faces/ladwp/aboutus/a-water/a-w-factandfigures?_adf.ctrl-state=1br8pflntd_4&_afrLoop=1054280876754233 (last visited Oct. 5, 2017) 8

William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887 (2003) 14, 16

William J. Hausman & John L. Neufeld, *How Politics, Economics, & Institutions Shaped Electric Utility Regulation in The United States: 1879-2009*, 53 Bus. Hist. 723 (2011) 6

William Kolasky, *Antitrust Litigation: What's Changed in Twenty-Five Years*, 27 Antitrust (Fall 2012) 14

INTEREST OF *AMICI CURIAE*[1]

The American Public Power Association ("APPA") is the service organization representing the interests of not-for-profit, public power utilities throughout the United States. More than 2,000 public power utilities, doing business in every state except Hawaii, provide electric service to approximately 49 million consumers, or about 15 percent of the nation's electric customers.

The Large Public Power Council ("LPPC") is an organization of 26 of the nation's largest public power systems.[2] The member utilities are locally governed and directly accountable to consumers. They provide electricity across 12 states, from Washington State to Florida, and from Arizona to New York, as well as the island of Puerto Rico. LPPC member utilities provide low-cost power to more than 30 million people – about 10 percent of the U.S. population. Collectively, LPPC member utilities own and operate more than 71,000 megawatts of generation capacity and over 30,000 circuit miles of high-voltage transmission lines.

---

[1] Pursuant to Rule 37.6, APPA and LPPC ("*amici*") affirm that no counsel for a party authored this brief in whole or in part and that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of *amici*'s intention to file this brief. The parties have consented to the filing of this brief, each in a separate writing that is being filed concurrently with this brief.

[2] Each LPPC member is also a member of APPA.

APPA, LPPC, and their members have a strong interest in preserving state-action immunity as it has been interpreted for decades. APPA and LPPC represent not-for-profit, public power utilities. These entities are either departments of city or town governments, or are special purpose governmental entities. They provide power, water, and many other services to millions of Americans. They serve public goals set forth by the states in which they operate. In the areas served by public power utilities, states have decided to displace a for-profit competitive marketplace that federal antitrust laws are designed to regulate and instead to provide low-cost, reliable, and essential services to citizens through these governmental entities. They are run by elected or appointed public servants.

State-action immunity respects the decision of sovereign states to delegate to these entities the power to operate free of the burden of antitrust laws. Ensuring that public power utilities can immediately appeal an adverse decision on state-action immunity helps protect these entities' ability to provide low-cost utility services without disruption, and insulates their public leaders' discretion to make reasonable policy decisions and avoid the costs and distractions of protracted litigation.

SUMMARY OF THE ARGUMENT

APPA and LPPC urge the Court to grant the petition for certiorari because it presents a question

that is important to their members and the communities that their members serve. The question – when a decision withholding state-action immunity may be appealed – directly impacts APPA and LPPC members and will indirectly affect the public by virtue of the unique role that APPA and LPPC members play in the community.

APPA and LPPC members (also referred to as "public power utilities") are governmental entities that provide power and other public services to 49 million Americans – services that are essential to everyday life. They also advance other goals that distinguish them from for-profit entities. In light of those public objectives, it is critical for APPA and LPPC members to be able to appeal an adverse decision on state-action immunity right away, and not wait until after a trial can be conducted and the district court's judgment on the merits can be issued.

Treating state-action immunity as an immunity from suit respects the sovereignty of state governments, which have delegated authority to public power utilities to administer important services. It also avoids negative practical consequences, such as unnecessary and significant litigation costs for our members, and a deleterious effect on our members' public-servant leaders. Forcing public power utilities to litigate antitrust claims before appellate review of adverse decisions on state-action immunity will undermine the purpose of the doctrine and hamper public power utilities' ability to meet their public objectives. This

case thus presents important issues that this Court should address. The Court should grant the petition.

ARGUMENT

I. STATE-ACTION IMMUNITY IS CRITICAL TO PUBLIC POWER UTILITIES' ABILITY TO FOCUS ON THEIR PUBLIC OBJECTIVES.

State-action immunity allows states to favor public objectives over free-market competition. This Court established the doctrine of state-action immunity in *Parker v. Brown*, 317 U.S. 341 (1943), holding that federal antitrust law – specifically the Sherman Antitrust Act – does not bar states from engaging in allegedly anti-competitive conduct "as an act of government." *Id.* at 352. This doctrine arises out of "the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Cmty. Commc'ns Co. v. City of Boulder, Colo.*, 455 U.S. 40, 53 (1982). The doctrine allows states, in certain "spheres," to "impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives." *N.C. State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1109 (2015). In recognizing the doctrine, this Court acknowledged the impossibility of forcing states to conform each of their laws and policies "to the mandates of the Sherman Act," noting that doing so would "impose an impermissible burden on the States' power to regulate." *Id.* This doctrine applies not just to states

themselves, but to local governmental entities when they "act[] pursuant to a clearly articulated and affirmatively expressed state policy to displace competition." *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 219 (2013).

Nowhere is this doctrine's aim to "achieve public objectives," *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1109, more relevant than in the work of public power utilities. Indeed, the question of whether state-action immunity bars suit and the timing of appellate review is crucial to APPA and LPPC members – and the communities they serve – because of their public purpose and the vast public services they provide.

A. Public power utilities are governmental entities that serve a public purpose.

State-action immunity allows public power utilities to focus their energy on "public objectives," *id.*, and APPA and LPPC members have many. APPA members are public power utilities, varying in size from large providers – such as the Los Angeles Department of Water & Power in Los Angeles, California – to small entities – like Madison Electric in Madison, Maine. Our Members, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/our-members. Twenty-six of the largest public power systems make up the membership of LPPC. Our Members, Large Pub. Power Council (2017), http://www.lppc.org/who-we-are/our-members. The public power utilities that are members of APPA and LPPC are either departments of city or town

governments, or are special purpose governmental entities created under state or municipal law to provide utility services. Public Power, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power ("Like public schools and libraries, public power utilities are owned by the community and run as a division of local government.").

By their very nature, these governmental entities serve public objectives distinct from the profit-maximizing aims of the private entities the antitrust laws were meant to regulate. *See Parker*, 317 U.S. at 351 (noting that the purpose of the Sherman Antitrust Act "was to suppress combinations to restrain competition and attempts to monopolize by *individuals and corporations*" (emphasis added)). Historically, public power utilities were developed not to maximize profits or concern themselves with competition, but to provide electricity service[3] to people who needed it. Public power systems aimed to expand electrification to rural areas in particular, a region of the country that private, for-profit utilities left unserved. William J. Hausman & John L. Neufeld, *How Politics, Economics, & Institutions Shaped Electric Utility Regulation in The United States: 1879-2009*, 53 Bus. Hist. 723, 726, 733 (2011).

---

[3] In places like California and Arizona, some public power utilities started by offering water, and only later offered electricity. *See Pac. Gas & Elec. Co. v. Sacramento Mun. Util. Dist.*, 92 F.2d 365, 368 (9th Cir. 1937) (noting that public utilities providing electricity had "become as interwoven in the lives of California men and women as . . . the function of supplying them with domestic water").

The public-oriented nature of these governmental utilities is borne out in how they use their revenue. Because public power utilities do not have shareholders, none of the utility revenues need to be devoted to paying dividends or otherwise distributing profit to equity investors. As a result, the cost-based rates charged by public power utilities are often lower than those charged by investor-owned utilities. Public Power, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power ("Homes powered by public power utilities pay nearly 15 percent less than homes powered by private utilities."). Moreover, public power utilities often make important contributions to other governmental functions in their communities. In 2014, for example, public power utilities "contributed 5.6 percent of [their] electric operating revenues back to the communities they serve." Public Power Pays Back at 3, Am. Pub. Power Ass'n (Apr. 2016) (hereinafter Public Power Pays Back), http://appanet.files.cms-plus.com//PDFs/PublicPowerPaysBack2014.pdf. This revenue contribution comes in a variety of forms, from discounted services, to general payments to the local government, to taxes. Examples of how public power utilities use this revenue for the public good include additional streetlighting; lighting for municipal buildings; traffic signals; and recreational facilities. *Id.* at 7-8.

B. Public power utilities provide a broad swath of public services.

Not only do public power utilities – at a general level – embody the state-articulated "public objectives" that state-action immunity is meant to protect, *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1109, they also provide a broad swath of critical services to which the public should have stable and reliable access. Different from the products and services that make up most of what American private industry offers, utility services are uniquely essential to everyday life and are, consequently, "affected with a public interest." 16 U.S.C. § 824(a) (stating, in Section 201 of the Federal Power Act, the public nature of electricity services); *see also State v. City of Austin*, 331 S.W.2d 737, 745 (Tex. 1960) ("Utilities are necessary adjuncts of the public welfare. Their business operations and their property have long been subject to special legislative treatment for many years." (internal quotation marks omitted)).

These services include electricity and water, first and foremost. For example, a full 49 million Americans – some 1 in 7 American electricity customers – receive their power from public power utilities. And just a single LPPC/APPA member – the Los Angeles Department of Water & Power – provides water to over 4 million people, through 681,000 active service connections. Water: Facts & Figures, L.A. Dep't of Water & Power, https://www.ladwp.com/ladwp/faces/ladwp/aboutus/a-water/a-w-factandfigures?_adf.ctrl-state=1br8pflntd_4&_afrLoop=1054280876754233 (last visited Oct. 5, 2017).

These utilities are "essential to the protection of [the public's] health and safety." *City of Austin*, 331 S.W.2d at 745. As recent natural disasters have demonstrated, without access to dependable electricity and clean water, communities struggle.

But public power utilities also provide services across the country far beyond electricity and water. Additional services may include sewer; wastewater; trash removal; street lighting; street maintenance; gas; and broadband. Owatonna Public Utilities in Minnesota, for example, provides sewer, gas, and streetlighting, in addition to electricity and water. Owatonna Pub. Utils., http://www.owatonnautilities.com/ (last visited Oct. 5, 2017). The Coldwater Board of Public Utilities in Michigan provides electricity, water, sewer, wastewater, and broadband services (including cable, internet, and phone). Our Services, Coldwater Board of Pub. Utils., http://www.coldwater.org/415/Our-Services (last visited Oct. 5, 2017). Hastings Utilities in Nebraska offers electricity, water, natural gas, sewer, and conducts maintenance on street lighting. Rates, Hastings Utils., https://www.hastingsutilities.com/rates/ (last visited Oct. 5, 2017). Idaho Falls Power offers a wide range of services, including electricity, water, trash removal/sanitation, and wastewater. Stop, Start, Move Service, Idaho Falls Power, https://www.idahofallsidaho.gov/268/Stop-Start-Move-Service (last visited Oct. 5, 2017). Bowling Green Municipal Utilities in Ohio even installs and maintains security lights on existing utility poles for a small monthly fee. Products & Services, Bowling Green Mun. Utils., http://bgmu.com/residential/

t/services-offered (last visited Oct. 5, 2017). Either state government, or the public power utilities themselves – and not the whims of investor demand – determines the services these entities provide to citizens.

State-action immunity's aim of allowing government to engage in allegedly anti-competitive conduct to advance public objectives, *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1109, aligns with states' authorization of public power entities to provide these essential services. In many parts of the country, where potential profit did not warrant private industry offering these services, state and municipal governments have acted to ensure that these services are available. State-action immunity protects those decisions from undue intervention under the banner of federal antitrust litigation.

II. WAITING UNTIL THE END OF TRIAL COURT LITIGATION TO APPEAL AND CONCLUSIVELY DETERMINE APPLICABILITY OF STATE-ACTION IMMUNITY UNDERMINES IMMUNITY'S PURPOSE AND HAS NEGATIVE CONSEQUENCES FOR THE PUBLIC.

State-action immunity must be resolved at the outset of litigation. Requiring parties like members of APPA and LPPC to participate in discovery and full-blown trials on antitrust claims before resolving state-action immunity questions will undermine the doctrine's purpose and cause negative consequences for public power utilities and the communities they serve.

And leaving the status quo – with some circuits allowing immediate appeal of state-action immunity decisions and others first requiring litigation through trial – will lead to variation based solely upon the boundaries of the federal appellate circuits.

A. Requiring participation through trial on all antitrust claims before review of state-action immunity denials undermines the doctrine's purpose of resolving conflicts between federalism and antitrust principles.

State-action immunity's purpose is to "resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace." *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61 (1985). The doctrine respects the "significant measure of sovereignty" afforded states "under our Constitution." *Cmty. Commc'ns Co.*, 455 U.S. at 53. If APPA and LPPC members – which have been created by sovereign states and delegated authority to provide public services – are forced to litigate entire cases before being able to appeal an adverse decision regarding state-action immunity, then the doctrine's goal of acknowledging and respecting state sovereignty is not being met.

In the case of public power utilities, states have made an important choice. Rather than take on the significant burden of interceding in the utility market directly or attempting to achieve public goals by

influencing the behavior of for-profit private enterprises, they have delegated authority to political subdivisions to achieve those public goals by providing utility services. Across the country, hundreds of APPA and LPPC members exercise delegated state authority to administer services that are essential to daily human life. States have made this type of delegation to ensure these services are provided in a stable and reliable manner, at a reasonable cost, especially where private providers may not be inclined to serve.

This choice on the part of states demands respect under our dual system of governance, and under the state-action immunity doctrine that is designed to respect state sovereignty. *Cmty. Commc'ns Co.*, 455 U.S. at 53. Haling public power utilities into court, and forcing them to litigate complex and expensive antitrust cases for years before they can receive appellate review of a determination that state-action immunity does not apply, affords no such respect. *See Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391, 1395 (5th Cir. 1996) ("One of the primary justifications of state action immunity is the same as that of Eleventh Amendment immunity -- to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." (internal quotation marks omitted)). It undermines a state's choice regarding these essential services, and it effectively neuters the protections state-action immunity is meant to provide.

B. Delay will have negative consequences for public power utilities, and the public.

It also is critical that public power utilities be able to resolve the application of state-action immunity at an early stage in litigation because of the practical impact of doing the opposite. APPA and LPPC members are not-for-profit public entities, which serve as divisions "of local government." Public Power, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power. What little excess revenue they may have is re-directed to their authorizing governmental units, or to their customers in the form of lower-cost services. Public Power Pays Back at 3. For any of the public entities that APPA and LPPC represent, litigation is costly, and will necessarily draw resources away from the public services these entities provide. Roger L. Kemp, Managing America's Cities: A Handbook for Local Government Productivity 102 (2007) (noting the tendency of local governments to settle lawsuits due to the significant cost of continuing litigation through trial, regardless of the legal merits of the case). Forcing these entities to litigate to the end of a case before determining if state-action immunity applies will waste significant resources, and ultimately hurt utility customers.

This is especially true in the context of antitrust litigation. As this Court recognized in *Bell Atlantic Corp. v. Twombly*, "proceeding to antitrust discovery can be expensive." 550 U.S. 544, 558 (2007). In support, this Court cited the discussion of "the unusually high

cost of discovery in antitrust cases" described in William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887, 1898-1899 (2003). *Twombly*, 550 U.S. at 559. Even when dissenting in *Twombly*, Justice Stevens, who arrived at the Court as an authority on antitrust litigation[4] acknowledged that "[p]rivate antitrust litigation can be enormously expensive[.]" *Twombly*, 550 U.S. at 573 (Stevens, J., dissenting); *see also Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers*, 536 F.3d 68, 77 n.7 (1st Cir. 2008) ("[A]ntitrust suits ordinarily entail massive discovery and are expensive to defend."). Antitrust litigation is routinely cited as one of the most complex and expensive types of litigation in the United States. *See* Manual for Complex Litigation, Fourth § 30, p. 519 (2004) (cited in *Twombly*, 550 U.S. at 559); William Kolasky, *Antitrust Litigation: What's Changed in Twenty-Five Years*, 27 Antitrust (Fall 2012) (noting the increasingly burdensome costs of e-discovery in antitrust litigation). This fact exacerbates the problem of forcing public power utilities to reach the end of trial court litigation before determining if an important protection could have saved them from suit in the first instance.

---

[4] "Justice Stevens was a prominent antitrust practitioner, lecturer and author before he was even Justice Stevens." Robert A. Skitol and Kennedy M. Vorrasi, *Justice Stevens' Antitrust Legacy*, 24 Antitrust No. 3 at 33 (Summer 2010).

The burden of litigating an entire case would be especially acute and overwhelming for the many APPA members that are small organizations providing services to small cities and towns. Hundreds of APPA members provide power and other services to small communities, yet nevertheless face the specter of antitrust litigation like this case. Public Power, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/publicpower ("Most public power utilities have fewer than 4,000 customers. . . ."). The difference between litigating to the end of a case at the trial court level, versus appealing immediately to obtain the protection of state-action immunity, could have an especially significant impact on small APPA members and the customers and communities they serve.

The burden of litigating to the end of a case also could discourage public service in the governance and management of APPA and LPPC members. Some public power utilities have elected leaders, such as the municipal utility district in *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193, 196 (2009), while the leaders of others are appointed by elected officials, such as the natural gas utility district in *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 605 (1971), and the municipally-owned utility in *Johnson v. Princeton Public Utilities Commission*, 899 N.W.2d 860, 867 (Minn. Ct. App. 2017); *see also* 2015 Governance Survey at 1-2, Am. Pub. Power Ass'n (May 2015), https://www.csu.org/CSUDocuments/appagovernancesurvey2015.pdf (noting that a majority of surveyed public power utilities

are governed by elected city councils, and that the remainder are governed by independent boards, which can be either elected or appointed). The threat of lengthy and protracted antitrust litigation, without the possibility of appealing regarding the protection of state-action immunity until after the end of trial, could deter public servants from leading public power utilities.

Even for those that are not deterred from serving, the weight and distraction of lengthy antitrust litigation will, at a minimum, impact the policy-making decisions of public power utilities' leaders. As the article on antitrust litigation cited by this Court in *Twombly* explains, "[a]necdotal evidence suggests that defendants unable to shift the costs of complying with requests for electronic documents feel pressured to settle lawsuits to avoid the discovery costs." Wagener, *supra*, at 1898. Instead of exercising the discretion and authority delegated to them by the relevant state, and providing services in a way that achieves public goals, public power-utility leaders may make defensive decisions that protect against the added burdens of antitrust litigation.

Finally, the costs of protracted antitrust litigation will be borne by the citizen-customers public power utilities serve. With private utilities, shareholders may bear the cost of litigation through reduced profits. Public power utilities have no shareholders; all of the costs of litigation will ultimately be shouldered by the citizen-customers they serve, whether through the rates they pay, reduced services, or both.

C. The status quo – with some circuits allowing immediate appeal of state-action immunity questions and others not – undermines federal uniformity.

The current state of the law on this question leaves public power utilities held to different standards across the country. APPA and LPPC members in the Fifth and Eleventh Circuits may appeal state-action immunity questions immediately. *Martin*, 86 F.3d at 1395-97; *Commuter Transp. Sys., Inc. v. Hillsborough Cty. Aviation Auth.*, 801 F.2d 1286, 1289-90 (11th Cir. 1986). Members in the Fourth, Sixth, and now Ninth Circuits cannot. *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720, 725-27 (9th Cir. 2017); *S.C. State Bd. of Dentistry v. F.T.C.*, 455 F.3d 436, 441-47 (4th Cir. 2006); *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563, 567-68 (6th Cir. 1986). This means some utilities across the country will have state-action immunity resolved before expending time, resources, and energy in trial litigation and others will not. These differences will have a direct but disparate impact on the communities that each of the members serve across the country. This Court should clarify the state of the law.

CONCLUSION

The practical impact of putting off appeal of a state-action immunity denial until the end of trial court litigation will be to impose the risk of massive

litigation costs on public power entities, with the potential to deter and distract their leaders. Public power utilities are governmental entities that serve important public purposes, and provide countless valuable services to the communities that they serve. The issues that this case presents are important enough that the Court should grant the petition and consider this case.

Respectfully submitted,

JOHN M. BAKER
Counsel of Record
JENNY GASSMAN-PINES
CHRISTOPHER L. SCHMITTER
GREENE ESPEL PLLP
222 S. Ninth Street, Suite 2200
Minneapolis, MN 55402
(612) 373-0830
jbaker@greeneespel.com
Counsel for Amici Curiae

No. 17-368

IN THE

Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Petitioner,

v.

SOLARCITY CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

MOLLY S. BOAST
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007
(212) 230-8800
molly.boast@wilmerhale.com
Counsel of Record for Petitioner

DEANNE E. MAYNARD
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave. NW
Suite 6000
Washington, DC 20006
(202) 887-8740
dmaynard@mofo.com
Counsel of Record for Respondent

PETITION FOR CERTIORARI FILED SEPTEMBER 7, 2017
CERTIORARI GRANTED DECEMBER 1, 2017

TABLE OF CONTENTS

Page

Relevant Docket Entries, *SolarCity Corp.* v. *Salt River Agricultural Improvement and Power District*, No. 15-cv-374 (D. Ariz.) 1

Relevant Docket Entries, *SolarCity Corp.* v. *Salt River Agricultural Improvement and Power District*, No. 15-17302 (9th Cir.) 4

Amended Complaint, *SolarCity Corp.* v. *Salt River Agricultural Improvement and Power District*, No. 15-cv-374 (D. Ariz. May 20, 2015) 7

RELEVANT DOCKET ENTRIES

U.S. DISTRICT COURT
DISTRICT OF ARIZONA (PHOENIX DIVISION)
CIVIL DOCKET FOR CASE #: 2:15-CV-00374-DLR

SolarCity Corporation* v. *Salt River Project Agricultural Improvement and Power District

Date Filed	#	Docket Text
		* * *
05/20/2015	39	AMENDED COMPLAINT against Salt River Project Agricultural Improvement and Power District, Salt River Valley Water Users Association filed by SolarCity Corporation. (Holtzman, Steven) (Entered: 05/20/2015)
		* * *
10/27/2015	77	ORDER granting in part the District's 53 Motion to Dismiss; granting the Association's 52 Motion to Dismiss; and granting in part the District's 54 Request for Judicial Notice. (See Order for details.) Signed by Judge Douglas L Rayes on 10/27/2015. (MMO) (Entered: 10/27/2015)
		* * *

Date Filed	#	Docket Text
11/20/2015	81	* NOTICE OF INTERLOCUTORY APPEAL to 9th Circuit Court of Appeals re: 77 Order on Motion to Dismiss by Salt River Project Agricultural Improvement and Power District. Filing fee received: $ 505.00, receipt number 0970-12359423. (Attachments: # 1 Representation Statement) (Babbitt, Christopher) * Modified to correct event on 11/23/2015 (LAD). (Entered: 11/20/2015)
		* * *
12/21/2015	102	ORDER denying the District's 82 Motion for Certification under 28 U.S.C. § 1292(b), and 83 Motion to Stay. (See Order for details.) Signed by Judge Douglas L Rayes on 12/21/2015. (MMO) (Entered: 12/21/2015)
		* * *

Date Filed	#	Docket Text
09/20/2016	241	ORDER granting 148Motion to Stay. All further proceedings in this matter are stayed pending resolution of the District's interlocutory appeal before the Ninth Circuit. All deadlines in this matter are vacated. FURTHER ORDERED denying 151 Motion for Leave to File Excess Pages; denying 152 Motion to Seal Document; denying 161 Motion to Seal Document; denying *167* Motion for Leave to File Excess Pages. Signed by Judge Douglas L Rayes on 9/19/16. (MAP) (Entered: 09/20/2016)
		* * *
08/03/2017	256	ORDER granting *251* Motion to Lift Stay. Scheduling Conference is set for 8/30/2017 at 4:30 PM, in Courtroom 506, Sandra Day O'Connor U.S. Federal Courthouse, 401 W. Washington St., Phoenix, Arizona 85003-2151. The parties shall file a joint proposed schedule by 8/23/2017. Signed by Judge Douglas L. Rayes on 8/1/2017.(MMO) (Entered: 08/03/2017)
		* * *

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Court of Appeals Docket #: 15-17302

SolarCity Corporation* v. *Salt River Project Agricultural Improvement and Power District

Date	Dkt. #	Pages	
		* * *	
03/14/2016	28	2	Filed order (Appellate Commissioner): Appellee's motion to dismiss this appeal for lack of jurisdiction is denied without prejudice to renewing the arguments in the answering brief. See Nat'l Indus. v. Republic Nat'l Life Ins. Co., 677 F.2d 1258, 1262 (9th Cir. 1982) (stating that merits panel may consider appellate jurisdiction despite earlier denial of motion to dismiss). Appellee's alternative motion to expedite the appeal is granted. The opening brief and excerpts of records are due May 2, 2016; the answering brief is due June 1, 2016; and the optional reply brief is due within 14 days after service of the answering brief.

Date	Dkt. #	Pages	
		* * *	
			Streamlined extensions shall not apply to this case. Any extension of time to file the brief must be made by motion under Ninth Circuit Rule 31-2.2(b), and is strongly disfavored. This case shall be calendared as soon as possible. (MOATT) [9901282] (AF) [Entered: 03/14/2016 03:56 PM]
		* * *	
06/12/2017	85	24	FILED OPINION (ALEX KOZINSKI, RONALD LEE GILMAN and MICHELLE T. FRIEDLAND) DISMISSED. Judge: MTF Authoring. FILED AND ENTERED JUDGMENT. [10467931] (RMM) [Entered: 06/12/2017 07:01 AM]
		* * *	
12/13/2007	86	3	Filed memorandum (ALEX KOZINSKI, RONALD LEE GILMAN and MICHELLE T. FRIEDLAND) The Power District's motion for judicial notice is accordingly denied as moot. DISMISSED. [10467933] (RMM) [Entered: 06/12/2017 07:03 AM]

Date	Dkt. #	Pages	
		* * *	
07/06/2017	90	1	Filed order (ALEX KOZINSKI, RONALD LEE GILMAN and MICHELLE T. FRIEDLAND): Appellant's motion for stay of the issuance of the mandate pending application for writ of certiorari is denied. See Fed. R. App. P. 41(d)(2)(A). [10498774] (AF) [Entered: 07/06/2017 09:22 AM]
		* * *	

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Civil No. 2:15-cv-00374-DLR

SOLARCITY CORPORATION,

Plaintiff,

vs.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT; SALT RIVER VALLEY WATER USERS' ASSOCIATION,

Defendants.

AMENDED COMPLAINT FOR ANTITRUST VIOLATIONS AND BUSINESS TORTS

DEMAND FOR JURY TRIAL

SolarCity Corporation ("SolarCity"), through its undersigned attorneys at Boies, Schiller & Flexner LLP, alleges as follows, based on knowledge as to its own actions and status, and upon information and belief as to all other facts.

INTRODUCTION

1. This case arises from Defendants' (collectively, the Salt River Project ["SRP"]) unlawful efforts to preserve its existing monopoly over the retail provision of electric power for consumers and businesses. Through this Complaint, SolarCity seeks relief under the federal and state antitrust laws, as well as the common law, from SRP's anticompetitive and tortious

conduct designed to eliminate solar competition, including competition from SolarCity.

2. SRP is a monopolist. In the territory it serves, it has monopoly power over the electrical grid, and it has monopoly power over the delivery and sale of electricity to retail customers.

3. SolarCity sells and leases rooftop solar energy systems to residential and business customers.[1] By buying or leasing solar energy systems, SolarCity customers are able to generate their own electricity on their own property. That reduces the amount of electricity that customers need to buy from SRP, allows customers to save money, and conserves natural resources.

4. SRP has a simple strategy to destroy the competitive threat from SolarCity and other competitors: under SRP's newly introduced pricing plans (called "Standard Electric Price Plans" ["SEPPs"]), customers who choose to obtain some of their own power from solar energy systems must pay a substantial penalty to SRP. Because solar customers are unable to completely disconnect from SRP's grid—they still need power in the evening hours and at other times when their energy demands exceed what their solar energy systems produce—they cannot escape SRP's penalty.

5. The penalty is so significant that it eliminates the economic value to customers of generating their own power. The SEPPs penalize what SRP describes as the "typical solar customer" by about ***$600 per year***

---

[1] These rooftop solar energy systems are sometimes referred to as "distributed solar," as distinguished from centralized, utility-scale solar power plants.

for installing solar as compared to SRP's longstanding prior plans, thereby increasing a new distributed solar customer's SRP bill by approximately ***65%*** compared to the previous plan. At the same time, SRP has adopted an average 3.9% increase for residential customers who keep purchasing all their power from SRP. Flexing its monopoly power, SRP has not adopted a price *decrease* for any customer.

6. SRP's own internal analyses establish that, with the SEPPs, a residential customer who wants to install distributed solar would simultaneously have to cut his or her peak electricity usage and demand by ***60%*** just to keep payments to SRP comparable to what those payments would have been under the previous SRP rate plan that applied to distributed solar customers.

7. Customers recognize that SRP's new pricing plan leaves them with no choice: after the effective date of SRP's new plan, applications for distributed solar systems in SRP territory (from any source, not just from SolarCity) fell by ***over 96%***. Numerous potential solar customers submitted complaints to SRP that corroborate that the new plan completely eliminates their ability and incentive to install solar systems.

8. SRP's penalty on solar customers is not justified by the costs SRP incurs to serve customers who use distributed solar. To the contrary, solar energy systems confer substantial benefits to the grid and to SRP itself that offset or reduce the cost of service for customers with solar energy systems. For years, SRP has explicitly recognized these benefits by spending tens of millions of dollars in incentives to encourage its customers to buy and lease solar energy systems for their homes and businesses.

9. In the space of just over two years, however, SRP has gone from providing monetary *incentives* averaging approximately $4,000 per customer to promote the installation of distributed solar systems to imposing monetary *penalties* on such installations, to the tune of $12,000 over the usual 20-year amortization period of installed systems. There is no reasonable basis for such an unprecedented and dramatic reversal.

10. The SEPPs place no similar penalties on any of the numerous other categories of SRP customers who have similar characteristics with respect to their use of the SRP grid, including customers who make relatively low or reduced electricity purchases from SRP for other reasons, such as those with high energy efficiency or seasonal residents, as well as customers who purchase solar power from the solar power plants with which SRP has contracts. The penalties correspond to only one thing: whether customers provide any of their own power instead of buying all of their power—including solar-generated power—from SRP.

11. Nor do the penalties imposed by the SEPPs correspond to any unique characteristics of distributed solar systems. Indeed, the penalties apply to all methods of self-generation—in other words, obtaining any electricity from sources other than SRP—regardless of whether they share the same cost and demand characteristics. The SEPPs are explicit that their penalties will likewise apply to "other technologies such as battery storage or fuel cells [which] may be viable in the future"—completely without regard to any actual impact of such technologies on SRP's cost recovery.

12. SRP's new self-generation price plans manifestly exclude competition and unlawfully

maintain SRP's monopoly over the retail sale of electricity in SRP territory. SRP unlawfully uses its position as the only available supplier of certain power (for example, the portion of electricity usage at times when the sun does not shine) to eliminate the ability of distributed-solar providers to compete for the substantial portion of SRP customers' retail power requirements that can be cost-effectively served by distributed solar. Through the SEPPs, SRP effectively requires customers who must buy *any* of their electricity from SRP (which is all or virtually all customers) to do so on terms that effectively require those customers to buy *all* of their power from SRP. This prevents customers from taking advantage of distributed solar when it is more efficient, lower cost, and far better for the environment.

13. SRP's penalty on solar customers is harmful to consumers, and harmful to competition. The SEPPs constitute an unlawful exclusive dealing arrangement that forecloses effectively *all* competition in the retail sale of electricity in SRP's service area. SRP's exclusion of distributed solar as a competitive alternative leaves nearly a million consumers with no choice but to buy all their electricity from SRP. Competition is eliminated, consumers are hurt, and the environment is harmed.

14. SolarCity brings this action to stop SRP's anticompetitive conduct and return competition and customer choice to the retail market.

PARTIES

15. SolarCity is a publicly traded company, incorporated in Delaware with its principal place of business in San Mateo, California.

16. SolarCity is America's largest installer of distributed solar energy systems. It engages in the design, manufacturing, installation, and sale or lease of solar energy systems to residential and commercial customers, who then use the systems to generate electricity and thereby displace a portion of their electricity purchases from an electric utility.

17. SolarCity has over 7,000 active customers in SRP's service area. In the six months prior to SRP's December 2014 announcement, SolarCity averaged almost 400 installations per month in SRP's service area.

18. SRP is a power-and-water utility. It is one of the nation's largest power utilities, and has over 900,000 electricity customers.

19. SRP's latest Annual Report describes "the Company" as composed of the two Defendants, "Salt River Project Agricultural Improvement and Power District (the District)" and "Salt River Valley Water Users' Association (the Association)."

20. The Annual Report and numerous other SRP documents use "SRP" to refer to the District and the Association jointly, a convention followed in this Complaint. This nomenclature reflects business reality. The District and the Association in fact operate as a single business.

21. The District and Association share the same management, President, and Vice President. Their executive bodies, called Boards and Councils, are nearly identical: All 30 members of the Association Council serve on the District Council, and 9 of the 10 members of the Association Board are directors for the District Board as well. In total, of the combined 46

officers and directors of District and the Association, 41 represent both entities.

22. Due to the almost entirely overlapping nature of the two SRP Boards and the two SRP Councils, the members of the District's governing bodies have a fiduciary duty to the financial interests of the private Association.

23. The District's Board and Council are not separate bodies from the District, but are in law and fact the same as a private company's board of directors—just as the Association's private Board and Council are constituted of its executives and officers.

24. There is no relevant difference between SRP's structure and governance and any private entity governed by a board of directors elected by a limited set of owners. Both serve the economic interests of the owners, not the broader interests of a larger set of customers to whom the entity provides products or services, or the public at large.

25. SRP spokesperson Scott Harelson publicly referred in April 2015 to the fact that SRP's "elected officials" represent "shareholders."

26. The Association is a private, for-profit corporation that files reports with the state listing its Board members as "directors" of the corporation.

27. The District and the Association frequently refer to themselves as a single entity called the "Salt River Project." Together, they issue combined financial statements. The Association was formed by Salt River Valley landowners in 1903 as a private corporation under Arizona law to enter into contracts with the federal government for the irrigation of their land.

28. In 1937, the District was created for the purpose of refinancing the Association's debts by issuing interest-free bonds, thereby saving the private landowners very large sums of money each year. The Association's responsibilities were divided between the District and the Association, with the District taking over the power and water storage work, and the Association managing water delivery as an agent of the District.

29. The Association continues today as a private corporation operating for the benefit of its private landowner shareholders.

30. In sum, the District and the Association operate as alter egos. The Ninth Circuit has expressly recognized this fact. As the *alter ego* of the District, the Association is also liable for the District's wrongful actions.

31. Today, SRP continues to participate in private markets and serve private economic interests. Arizona courts have characterized SRP's electricity operations as a "proprietary or business function."

32. Only real property owners in the District are allowed to vote in District elections. Their votes are counted in proportion to their land holdings. In addition, the right to vote, even for real property owners, is further limited to specific geographic areas within the District. For the most part, these additional restrictions limit voting rights to the lands whose water needs were originally served by the Association in 1903. Consequently, about one-third of the District's electricity customers have no right to vote in District elections.

33. This structure encourages SRP to serve the private interests of landowners, particularly large landowners who value cheap water, at the expense of a broad base of electricity customers.

34. For example, the President of SRP owns what an online biography of him calls "one of the largest produce companies in Central Arizona," and a majority (at least 8 out of 14), of the District's Board members own or hold interests in agricultural businesses.

35. SRP behaves consistently with economic incentives to serve a limited, select portion of the population in SRP territory.

a. SRP stated in January 2015 that its average agricultural user's annual water expenses would increase from $8,749 to $55,054 if its supracompetitive electric revenues could no longer be used to subsidize the big agricultural landholders to whom SRP is particularly beholden.

b. SRP admits that its electric operations run profitably (even before the SEPPs)—to the tune of $100 million in profit from electricity operations over the last year—and that it uses much of those profits to subsidize its water customers and its money-losing water operations, by millions of dollars per year. SRP has suggested the subsidy was $52 million in 2014, but SRP's publicly disclosed financials show that the figure was much more likely over $100 million.

c. The Arizona Supreme Court has characterized SRP's behavior as taking profits from electric service and using them to irrigate "private lands for personal profit."

36. A December 31, 2014 Standard and Poor's ratings summary for investors in the District's bonds praised "management's commitment to strong financial margins."

37. As another illustration of SRP's private-market participation and incentives, the District has entered into at least three agreements to purchase all output from three large, privately owned solar farms. One agreement obligates the District to purchase all output for 20 years; another obligates the District to purchase all output for 21 years; and another obligates the District to purchase all output for 25 years. SRP then sells output for these facilities, which it markets in competition with distributed solar.

38. SRP provides rich perquisites to its executives and officers.

a. For example, it has paid over $2.9 million for their dependents' tuition since 2009. General Manager Mark Bonsall, for instance, was paid an $847,672 salary in 2013 and has had, in total, $92,689 of dependents' tuition reimbursed—in addition to other perquisites. Similarly, SRP President David Rousseau has received $71,406 in dependent tuition reimbursements. SRP has publicly stated that it is driven to offer high compensation and benefits in order to compete in the labor market with private companies that sell private electricity and related services.

b. SRP also paid $1.6 million in 2014 for what it calls "events and entertainment." This includes, for example, sponsorship of major sports teams and events, such as the Super Bowl. When used by a monopoly, these types of expenses most likely constitute what economists call "gold plating"—

where executives and officers act in their private self-interest.

39. SRP recognizes that it competes with other market participants with respect to its customer negotiations. The District Board regularly meets in closed session to discuss what Board agendas call "matters relating to competitive activity, including trade secrets or privileged or confidential commercial or financial information." For example, SRP used that description for a May 2015 Board meeting where it considered a commercial customer's potential contract as just such a nonpublic, competitive agenda item. The dispute between SolarCity and SRP involves the terms on which SRP and distributed solar providers offer their services, including both commercial and consumer contract negotiations.

40. Although the District has been described as a subdivision of the state, it lacks traditional governmental powers. It cannot impose ad valorem property taxes or sales taxes, enact any laws governing the conduct of citizens, or administer such normal functions of government as the maintenance of streets, the operation of schools, or the provision of sanitation, health, or welfare services. Its employees are allowed to strike under their labor contract, it is not immune from Arizona banking laws, it is not exempt from a city's power of eminent domain, and it is not immune from tort liability. The District can only levy taxes against landowners proportional to the number of acres owned, not against the general public.

41. On April 16, 2015, an attorney for SRP stated in writing that the District is not a "tax supported district."

42. Neither Arizona's utility regulator, the Arizona Corporation Commission, nor any federal regulatory authority has rate-setting or review authority over the District or its retail operations. Instead, the District is free to act as to the misconduct alleged herein without state regulatory oversight, subject to an express state policy of promoting competition in the retail sale or provision of electricity and the application of the state antitrust laws. The District itself is not recognized by state or any other law as a regulator or regulatory authority in the retail market.

JURISDICTION AND VENUE

43. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1337(a), as well as 15 U.S.C. § 22, because this action seeks damages and injunctive relief to remedy, prevent, and restrain violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. § 14, within the meaning of 15 U.S.C. §§ 15, 26.

44. This Court has supplemental jurisdiction over the state claims under 28 U.S.C. § 1367. Furthermore, this Court has diversity jurisdiction over the state claims under 28 U.S.C. § 1332 because there is complete diversity between the parties and the matter in controversy exceeds $75,000 before interest and costs.

45. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b), and 15 U.S.C. §§ 22 and 26, because the Defendants are residents of this District and their conduct alleged herein took place, and continues to take place, in this District.

46. In addition to the detrimental effects felt in Arizona, SRP's conduct substantially affects interstate commerce in that it harms competition from SolarCity

and other out-of-state companies, as well as new entry from out-of-state competitors. For example, many of the distributed-solar companies that do or have recently done business in SRP's service area (SolarCity, Sunrun, SunPower, Sungevity, and Verengo) are based in California.

47. SRP's conduct also substantially affects interstate commerce in that SRP relies on interstate commerce by purchasing, delivering and selling electricity on an interstate basis.

RELEVANT MARKETS AND MARKET POWER

48. The relevant geographic market is SRP's service area.

49. At a minimum, the relevant product market is the provision of electric power to end-use residential, governmental, and businesses consumers (hereafter the "retail market"). In this market, power may be provided by various sources, such as through the outright sale of power, or by the lease or sale of distributed systems through which a customer generates power on his or her own property.

50. SolarCity directly competes with SRP in the retail market because SolarCity offers equipment and services that provide electricity—specifically solar-generated electricity—to customers. By using SolarCity's equipment and services, customers reduce the amount of power that consumers purchase from SRP.

51. In the ordinary course of business, SRP fully recognizes that SolarCity and other distributed solar providers are competitors. For example, an SRP employee explained during the pricing process that SRP's goal was to defeat "the enemy," by which she

was referring to distributed solar. Similarly, the Edison Electric Institute—a utility trade group with which SRP corresponded during the SEPPs' approval process—has published a report about the "Changing Retail Electric Business" that admits the direct nature of competition in the retail market between distributed solar and utilities such as SRP:

> "Today, a variety of disruptive technologies are emerging ***that may compete with utility-provided services.*** Such technologies include solar photovoltaics (PV), battery storage, fuel cells, geothermal energy systems, wind, micro turbines, and electric vehicle (EV) enhanced storage. As the cost curve for these technologies improves, they could directly threaten the centralized utility model." [emphasis added]

52. Arizona's legislature has expressly recognized that "self-generation" by customers reduces demand from entities such as SRP.

53. SRP has monopoly power in the retail market within the geographic market, currently providing more than 95% of the electricity used by retail customers in SRP territory.

54. Another indicator of SRP's monopoly power is SRP's long-standing ability to extract supra-competitive profits from its electric operations and use them to fund its money-losing water operations.

55. In addition, there are high barriers to entry in the retail market, including as a virtue of the need for new providers to interconnect with the SRP grid.

56. SRP provides retail electric power through a variety of different plans and sources. For example, for

residential customers, SRP provides a standard plan (E-23) under which customers purchase power on a generalized basis for specified per-kilowatt-hour ("kWh") rates and a monthly service charge; a "time-of-use" plan (E-26) under which the per-kWh rates vary by time of day, in addition to the same monthly service charge; a Community Solar plan under which customers purchase power generated by solar power plants at different per-kWh rates and the same monthly service charge; and a variety of other plans, including separate plans for commercial and governmental customers.

57. SRP's Community Solar plan is a particularly close substitute for distributed solar power.

58. Other relevant markets exist, either as submarkets within the retail market or as complementary or adjacent markets of their own, such as the market for access to distribution and transmission services that move power through the electric grid ("grid access market").

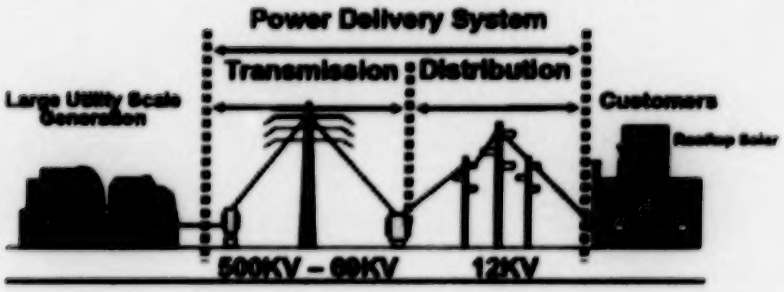
59. There are high barriers to entry in the grid access market because duplicating the distribution and transmission systems that SRP controls would require massive investment, permitting, construction, and many other hurdles.

60. Traditionally, SRP sold grid access together with the electricity generated by power plants, which were both included in a largely single per-unit (kWh) price based on electricity usage.

61. More recently, and particularly with the SEPPs as applied to self-generating customers, SRP has moved to unbundle grid access from power sales.

The SRP-created graphic below shows how grid access relates to retail customers:

Power Delivery System
"The Grid"



62. SRP has monopoly power over grid access within the geographic market.

63. Whether SRP customers self-generate power (including through distributed solar provided by SolarCity) or not, all or virtually all of them still need to purchase both retail electric power and grid access from SRP to have access to power at times that alternative sources of power (such as distributed solar) cannot meet the customers' needs. SRP has monopoly power over these incontestable portions of consumer demand, even while SolarCity and other distributed solar companies try to provide competition for the contestable portion of demand.

64. SRP invited a guest speaker from a utility industry-funded group supported by SRP—to comment on the SEPPs at a hearing. That speaker admitted that it is not "possible [for consumers] to go off the grid" because technologies such as battery storage and fuel

cells will not be "economically viable at all in the next 15 years or so."

65. SRP's monopoly power is not the result of any state policy to displace competition in favor of an SRP monopoly, or government regulation or supervision.

66. Indeed, Arizona statutes expressly declare support for electric competition and have expressly removed any doubt that the antitrust laws apply to SRP's conduct.

67. Arizona's legislature attempted to force SRP open to competition by enacting the Electric Power Competition Act, which required SRP to make it possible, in theory, for other utilities in Arizona to sell power to retail customers in SRP's service area through SRP's grid access facilities. However, part of SRP's 2014 Annual Report (its Audited Financials) explains that this type of competition has not materialized: "there is no active retail competition within the District's service territory" for the type of service the Act addressed.

68. The Act expressly forbids SRP from using any "reduction in electricity purchases" from "self-generation" to justify calculating or recovering any costs—"fixed" or otherwise—that constitute "stranded costs," or to "consider the profits or losses associated with electric generation service in establishing electric distribution service prices."

69. The Act also makes clear that SRP remains subject to the antitrust laws.

GENERAL ALLEGATIONS

Industry Background

70. Distributed solar systems generate electricity when the sun shines on them. Depending on the solar panels' orientation, generation continues for hours and often peaks near mid-day. Distributed solar in Arizona offers peak generation during many of the highest-usage hours and provides clean power for much of the peak-demand period, which reduces demand on the electric grid and mitigates the need for incremental generating and transmission capacity.

71. Distributed solar benefits utilities, including SRP, in many ways, including by, among other things, reducing electric demand, particularly during the electric system's peak hours, when electricity from other sources is available to the utility only at high prices; adding electric capacity, particularly during the electric system's peak hours, when electricity from other sources is available to the utility only at high prices; reducing transmission costs by reducing congestion or allowing utilities to reduce or defer investment in enhancing or adding transmission facilities; reducing the utility's long-term capital needs for investment in power generation capacity; and helping the utility meet environmental or "green" goals or requirements.

SRP's Prior Course of Conduct

72. The benefit of solar generation to SRP is demonstrated by SRP's own decision to make substantial investments in solar power and offer incentives to customers to adopt it. For years, SRP has provided customers incentives—totaling approximately $150 million—to encourage the installation of

distributed solar systems. Moreover, SRP has committed to buy the output from at least three substantial solar facilities and owns at least three facilities outright.

73. SRP's distributed solar investments were rational and justified because electricity generated by solar power in or near SRP's service area benefits SRP by meeting demand during peak periods (such as during sunny summer days), reducing costs of generation, providing renewable energy credits ("RECs"), and otherwise.

74. SRP has also recognized the benefits of solar in other ways. For example, SRP has for years offered residential and small-to-medium-sized commercial and government customers "net metering," a system that helps encourage distributed solar in which the utility company offers the customer a bill credit for excess solar production when a customer's distributed solar system produces more than the customer uses.

75. Under net metering, the excess electricity from a distributed generation customer's solar system is transferred into the grid and purchased at retail rates by the distributed solar customer's neighbors or others. The distributed solar customer is then billed for its "net" electricity use (*i.e.*, what the customer took from the SRP network minus what the customer added to the network).

76. SRP voluntarily adopted net metering, and has engaged in that program for years on terms that benefitted SRP and its customers. Among other things, net metering has reduced SRP's need to purchase costly power from other sources and to make investments in power generation.

77. SRP publicly touted the benefits of distributed solar and encouraged its customers to use it. As SRP customers recently commented to SRP:

> "You guys convinced me to go solar back when you were subsidizing the installation. You also touted solar because it would reduce demand and add to your generating capacity. I made a 20 year commitment and a major roof top change based on your recommendations!"

> "When we decided to go with solar, I talked with different SRP people, and was told that you were all for us 'helping SRP to produce electricity', as it would help you to keep from having to pay for all the new equipment to provide more electricity. Now we hear that you want to penalize us for the decision that you helped us to make."

> "As a customer of yours for some 18 years now, we bought into your advertising that by going solar you not only help yourselves, but you help your neighbors, the environment, and SRP at the same time. We were told that by going solar, we'd help reduce the drain on the system during peak power usage. We'd help reduce carbon emissions. We'd help SRP delay the spending of resources to expand the grid to deliver more power. You even put together incentives to drive us as customers to solar."

SRP Begins to Change Course to Eliminate Competition

78. In or around 2011, as distributed solar increased in popularity and efficiency, SRP began to

recognize that distributed solar could become a competitive threat in the longer term.

79. In part as a response, SRP developed its "Community Solar" program, where customers purchase solar-generated electricity. SRP pitches Community Solar as a direct competitor to distributed solar.

80. SRP has strong financial incentives to sign customers to Community Solar. Because SRP has obligated itself to buy all output from at least three large-scale and privately owned solar farms, SRP has a strong financial interest in ensuring demand for that electricity.

81. Unaccustomed to competition and perhaps believing that solar-generated power had different consumer demand characteristics than traditionally-generated power, SRP initially overpriced Community Solar for consumers, making it uncompetitive with distributed solar, particularly as distributed solar prices rapidly declined. By December 2013, SRP reported that one of its solar farms was selling only 60% of its output.

82. In December 2013, SRP had to lower Community Solar's pricing to meet competition from SolarCity and other distributed solar providers.

83. This kind of pricing to demand is foreign to a monopolist. SRP manager John Tucker regretfully explained the reason for the Community Solar rate drop: "It's come to the point where solar customers expect to realize some sort of savings." In other words, customers who invested in distributed solar that reduced their usage and provided surplus power to the grid expected to save money on their electric bill.

84. Despite distributed solar's benefits to SRP in the short- and medium-term, SRP has come to recognize that, as distributed solar continues to grow, distributed solar will force SRP to adapt to vigorous competition in the future—including on metrics like price, service, innovation, and the ability to efficiently generate electricity.

85. Meanwhile, SRP eliminated incentives to install distributed solar. That did not stop SRP's revenue loss due to competition with distributed solar, because distributed solar does not depend on any incentive or subsidy from SRP.

86. SRP presentations and emails, including an exchange between SRP and consultants hired to justify the SEPPs, reflect SRP's concerns about price competition and an increasing competitive distributed solar threat. For example, one noted that "solar lease rates recently fell below retail rates" and SRP still faced an "uptick in solar installations despite the end of direct/cash incentives." In other words, solar leases were increasingly competitive on price.

87. As SRP's own consultant, hired to justify its SEPPs, summed it up: SRP faces "the present reality of industry transformation" due to distributed generation and energy efficiency.

SRP Changes Course

88. In response to this growing threat, SRP committed to using its monopoly power to eliminate rooftop solar competition.

89. In December 2014, SRP announced its intent to adopt the SEPPs to apply new service terms and rates to its customers.

90. SRP spent about $1.7 million on advertising from December 2014 through February 2015, the majority of which was specifically about the SEPPs, and also included creating and distributing an advertisement regarding a new Community Solar plant. As noted above, an SRP employee explained in an email that SRP's goal in this connection was to defeat "the enemy": distributed solar.

91. In or around December 2014, in coordination with the SEPPs' announcement and release, SRP initiated a series of hearings and limited information disclosures. SolarCity was a member of the public that—as with interest groups such as the American Association of Retired Persons, SRP's union, and various Chambers of Commerce—made its voice heard, but was not a "party" to the SRP pricing process.

92. SRP referred to SolarCity and others as "stakeholders" and provided an "informal process to allow participants to gather information and ask questions of Management." SolarCity does not contract directly with SRP to provide systems to consumers.

93. SRP has no authority to engage in anything approximating "regulation" of self-generation under Arizona law, including under the Electric Power Competition Act, because that Act does not apply to self-generation.

94. SolarCity did not have a right to control SRP's SEPP proceedings, to make a defense, to present evidence, or to appeal in connection with the SEPPs.

95. Late in the process, SRP refused to continue providing materials to entities that requested information as part of the process, confirming that SRP viewed its information disclosures as voluntary.

96. On February 19, 2015, SolarCity's Chief Executive Officer sent a letter to SRP's President informing SRP that if the Board approved the SEPPs, SolarCity "would have no choice but to sue SRP for violating the state and federal antitrust laws." Shortly thereafter, SolarCity's attorneys met with certain Board members concerning the antitrust issues. SRP was well aware of and had ample time to consider SolarCity's threatened litigation, even holding a special meeting of the Board to discuss the issue on the day of the vote.

97. The District's Board of Directors approved the SEPPs, with minor changes, on February 26, 2015.

98. SRP has never released any written final decision stating the factual and legal bases for the SEPPs.

99. SolarCity asked, but SRP refused to provide, a final "resolution" or similar document that might lay out the factual and legal bases. SRP has adopted such formal resolutions in past decisions.

100. The lack of clarity is illustrated by a recent dispute concerning whether the 3.9% general price increase for residential customers implemented by the SEPPs was to go into full effect on April 1, 2015, or after the summer peak season.

101. In this decision, it appears that the Board simply relied on management's oral statements, as exemplified by the dispute concerning the 3.9% general increase:

> a. General Manager Mark Bonsall told the Board during a public hearing: "Instead of going to $3 from the get-go, we would go to a dollar and a half [...] this summer, it would remain a dollar and

a half, and when next winter commences, it would go up to the full $3."

b. SRP then immediately imposed the full $3 at "the get-go"—in its April 2015 bills. When challenged by the media, SRP said that Mr. Bonsall's representation did not matter because the version of the SEPPs released in December 2014 were contrary to Mr. Bonsall's representation.

102. SRP employees have stated to the media that SRP would not reconsider its SEPPs. Neither SRP's governing statutes nor its Rules and Regulations provide any procedure for demanding a rehearing, and SolarCity has been unable to find evidence that SRP has ever conducted a rehearing.

103. This is not surprising because, as one SRP Board member stated during the public pricing process, "I don't want management [...] to think I'm second guessing them in anything they do." Similarly, management feels free to *direct* the Board as to matters such as the Board's public communications.

104. Nonetheless, on March 24, 2015, SolarCity sent SRP an additional letter notifying SRP of its intention to seek damages under Arizona state law unless SRP were to agree to a settlement including rescinding or reconsidering its decision and compensating SolarCity for the harm caused by the retroactive application of the SEPPs.

Anticompetitive Impact And Tortious Conduct

105. For what SRP's own emails call "requirements" customers—those who purchase all their electric requirements from SRP—the SEPPs follow SRP's traditional rate structure, with charges largely for per-kWh electricity usage and secondarily in

the form of a fixed monthly service charge, which SRP raised from $17 to $20. The overall effect of the new terms and rates, according to SRP, will be an average 3.9% increase.

106. For the first time, however, the SEPPs also include rate plans that uniquely apply to self-generating residential customers who purchase both electricity from SRP when their systems are not generating power and grid access for transmission of that electricity and for the electricity generated by their systems and made available to other users. These self-generating residential customers are overwhelmingly or exclusively distributed solar customers. SRP's emails call them "Partial Requirements" customers.

107. The SEPPs, and particularly the new rate plans that apply to self-generating customers only, have the purpose and effect of eliminating future distributed solar installations. Overall, in comparison to the 3.9% increase across the full range of SRP's over 900,000 electric customers, the new rate plans dramatically increase (retroactively to December 8, 2014) the costs of switching to distributed solar. For example, using SRP data for what SRP describes as a "typical solar customer," the new residential plan will result in an increase of approximately ***65%***—approximately ***$600 per year***, or ***$12,000 over twenty years***—for a new distributed solar customer compared to what that customer would have paid under the previous rate structure that applied to self-generating customers. Existing distributed solar users—already essentially lost to SRP for significant portions of their electricity purchases—are "grandfathered" into the old plans.

108. The SEPPs' huge fees for residential distributed solar customers, which have no corresponding changes for either non-solar or Community Solar customers, include:

a. A "distribution charge" of either $12.44 or $37.88 per month, depending on whether the customer has service below or above 200 amps. By contrast, SRP charges non-solar and Community Solar customers a flat $4.20 per month "distribution charge." This distribution charge is part of a discriminatory monthly service charge, totaling a flat $20 per month for all customers except self-generating customers, but $32.44 to $57.88 per month for self-generating customers.

b. "Demand charges" for each kilowatt of usage in the customer's most intensive 30-minute peak period each month, regardless of who generates the power used during that period, such that for the "typical solar customer" profile provided by SRP, the discriminatory demand charge will range from about $30 per month in the winter to around $125 in the summer peak months. Customers without distributed solar face no demand charge at all.

c. Substantially reduced bill credits for the power that distributed solar customers send *back* into SRP's grid for SRP to re-sell to other customers.

109. The only practicable way to escape the charges is to forgo installing distributed solar systems or to radically reduce peak usage, both overall and for every single 30-minute period of peak period usage every month. A consultant hired by SRP admitted that a residential customer who wants to install distributed

solar would simultaneously have to cut peak electricity usage and demand by ***60%*** just to keep paying SRP "about the same" as those payments would have been under the previous plan.

110. Under the SEPPs, for a residential self-generating solar customer to break even after installing a distributed solar system, SolarCity would have to charge far less per kWh on a retail basis than the 5.3 cents per kWh wholesale price SRP announced it will pay its largest Community Solar generator.

111. Commercial customers will pay about 2% more annually (on top of other pricing increases) as a penalty, as well as lose net metering altogether, if they use distributed solar under typical circumstances. In view of the average commercial customer's high energy consumption, that increase, including the 2% penalty, translates into more than ***$24,000*** each year. As with residential customers, the SEPPs' new penalties render it impossible for commercial, municipal, and educational customers to obtain any viable return on a new distributed solar investment.

112. SRP's anticompetitive intent is clearly revealed by the fact that there are no differences in usage patterns between new distributed solar customers subject to the discriminatory charges and the grandfathered existing distributed solar customers or the Community Solar customers. The only distinction is that the new distributed solar customers represent incremental losses of business to competitors, while the Community Solar customers and customers with existing solar installations do not.

113. Given the sheer magnitude of the increases for new distributed solar customers, it is clear that the purpose of the SEPPs is not to recoup reasonable grid-

related costs from distributed solar customers, but to prevent competition from SolarCity (and other providers of distributed solar) by punishing customers who deal with such competitors with higher prices on the remainder of any power that those customers continue to purchase from SRP.

114. SRP knows that very few, if any, customers will make the economically irrational decision to install distributed solar systems if the result will be to pay a *higher* total amount for power. SRP has designed its price plan to make it irrational for any customer to obtain solar power from a competitor because SRP knows that every customer depends on it for some part of its power demand.

115. SRP does not try to hide its anticompetitive intent. In its efforts to justify the SEPPs, SRP asserted that those who do not like the new, high rates on distributed solar users should "take part in [SRP's] Community Solar program."

116. By making the new rate structure retroactive to December 8, 2014, SRP has already seen the anticompetitive result of its new policies: SRP received about 500 distributed-solar applications per month from May through October 2014. The announcement of the SEPPs itself was an anticompetitive act, as it stopped solar applications and installations almost entirely in their tracks. Between the time SRP published the SEPPs on December 12, 2014 and April, 2015, SRP received just 75 distributed-solar applications, or approximately 19 applications per month.

117. The SEPPs harm every consumer in SRP territory, not just distributed-solar customers. Studies show that the availability of renewable energy,

including distributed solar, results in lower consumer prices for all customers.

118. The SEPPs are agreements (indeed, agreements in restraint of trade) within the meaning of the antitrust laws because they form part a critical part of the express contract that customers have with SRP.

119. The SEPPs are exclusionary because they punish customers for dealing with SRP's competitors by raising prices those customers must pay for a product (portions of electricity not addressable through self-generation) and a service (access to the electrical grid) over which SRP holds an unassailable monopoly position.

a. Among other things, the SEPPs constitute unreasonable exclusive-dealing agreements because they require customers who wish to obtain essential power and grid access from SRP to agree to terms that preclude economically rational customers from dealing with distributed solar competitors like SolarCity.

b. The antitrust laws are flexible and offer a variety of legal paths to the same conclusion as the "exclusive dealing" reasoning. For example, the SEPPs can be viewed, and warrant the imposition of liability, as monopolizing, attempting to monopolize, and unreasonably restraining trade in the retail market by, *inter alia*, tying, bundling, raising rivals' costs, creating and enhancing barriers to entry, and/or leveraging SRP's monopoly power in the market for grid access to foreclose competition in the retail market, both through unilateral conduct and as part of customer agreements with SRP. In short, SRP is using its existing monopoly power in both the retail market

and the grid access market, to create and enhance barriers to entry in the retail market, because SRP is both concerned about competition and intent on excluding that competition.

c. Similarly, SRP has reversed a long-time course of conduct that had generated customer goodwill, benefitted SRP in the short- and medium-term, and created a unique combination of services that consumers enjoy (rooftop solar and electric grid interconnection), for the sake of excluding longer-term competition by preventing customers in its service area from installing distributed solar from competitors like SolarCity.

d. The economic substance of all these legal routes is similar: Through both unilateral conduct and customer agreements, utilizing its ability to restrain trade for its nearly one-million captive electric customers, SRP is using its power over consumer demand that is inelastic or incontestable by competitors to exclude competition in, and to monopolize, the retail market.

120. SRP also engaged in conduct with respect to the SEPPs that was designed to interfere with and impair the obligations of SolarCity's contracts and prospective contracts.

a. Specifically, with knowledge of key SolarCity contracts and prospective business relationships, SRP manipulated deadlines and made the SEPPs retroactive in order to interfere with SolarCity's customer relationships.

b. For example, SolarCity spent two years working with Maricopa Community Colleges to implement multiple solar installations totaling over

12 megawatts in capacity. According to an SRP employee, it sent "chills down the spine" of SRP management when SRP learned that Maricopa and SolarCity were nearing a successful deal. In releasing the SEPPs on December 12, 2014, SRP established that the deadline for grandfathered applications would be retroactive to December 8 (even though the pricing plan would not be voted on until February 2015), knowing that doing so would eliminate Maricopa's and other commercial, municipal, and educational customers' ability to qualify for the then-existing rate plan. Accordingly, even though Maricopa unanimously voted to authorize an agreement with SolarCity on December 9, 2014, even before the release of the proposed SEPPs, it was already too late.

c. Similarly, SolarCity and the City of Mesa were negotiating a deal before the SEPPs were announced. SRP learned of these negotiations and designed the SEPPs' commercial provisions to make the City of Mesa solar project—and projects like it—uneconomic. A City of Mesa employee spoke at one of SRP's hearings on the SEPPs, during which she discussed the City of Mesa's numerous interactions with SRP concerning its solar projects. After the SEPPs were introduced, and as a result of SRP's conduct, the City of Mesa ended negotiations with SolarCity.

d. The City of Tempe and SolarCity began negotiating certain projects with SolarCity in early 2013. SRP was aware of the negotiations before the SEPPs were released. Tempe approved the projects before SRP adopted the SEPPs. After the SEPPs were imposed, Tempe asked SRP for a reprieve from the SEPPs' punitive terms. SRP

declined, and Tempe abandoned some of the approved SolarCity projects.

e. In addition, approximately 500 residential customers decided not to move forward with plans to do business with SolarCity after the SEPPs were imposed. Because residential customers interact with SRP during the SolarCity negotiating process, SRP knew of most or all of these customers' plans. SRP designed the retroactivity date and SEPPs' announcement timeline to interfere with SolarCity's business with these customers.

121. SRP's course of conduct has had and will have an *in terrorem* effect that SRP intended and that has actually resulted.

a. SRP's manipulation of the deadlines, retroactivity, and baseless rate changes were designed to show customers that they cannot lower their SRP bills by dealing with competitors such as SolarCity.

b. Thus, SRP's conduct and pretextual justifications have made clear that SRP has the ability to enhance and/or modify its penalties to continue to prevent competition even if SolarCity and other competitors were somehow able to adjust their offerings to address it.

Harm And Damage

122. SolarCity has lost substantial past, present, and future revenues and profit as a result of SRP's anticompetitive conduct. These damages are the result of harm to competition, not just to a competitor.

123. SRP's rates have made rooftop solar profoundly uneconomical. Indeed, as noted above,

there was over a 96% drop in new distributed solar applications in SRP territory since December 12, 2014.

124. SolarCity has identified at least 500 customers who did not move forward with SolarCity as a result of SRP's SEPPs after the SEPPs were announced, and SolarCity cannot justify continuing to offer leases or sales in SRP territory. No rooftop solar company will be able to compete effectively with SRP under SRP's punitive SEPPs. This is illustrated by the near-total elimination of new distributed solar applications since December 12, 2014. It is also illustrated by the comments of numerous SRP customers, including for example:

> "By adding the proposed fees, it is no longer feasible for someone like me to lease a system from SolarCity and there is no way I can buy one outright so you are proposing to cut an entire class of people out of being able to have solar on their property."
>
> "I was considering installing a very small solar system to help the environment a little bit by increasing the portion of my energy consumption that is clean, and lower my costs a bit. By my calculations, this ridiculous anti-environmental penalty would make me lose money each month rather than saving money to re-coup the costs."
>
> "Seeing the new projected additional cost for homeowners with roof top solar systems just made my decision to NOT go this route, which I had been considering."

> "I've been so excited to get a solar system on my home I just moved into, but with your new rate plan I have no incentive to go solar now."
>
> "You are taking the opportunity to eliminate the solar industry in AZ. With this move you have penalized anyone thinking about solar and using it for future use. Monopolies are not the norm as people look for alternative energy .... What would SRP do if there was another competitor on this grid? Competition breeds better pricing for all."

125. SolarCity has already offered to transfer numerous employees, resulting in the voluntary transfer of 85 employees to other states because of SRP's conduct. SolarCity may be forced to conduct further employment actions, including possible layoffs, as a result of SRP's illegal conduct. To alleviate the harm to its employees, SolarCity is seeking promptly to relocate as many people as possible, consistent with all state and federal notice requirements. But for the anticompetitive penalties imposed by the SEPPs, SolarCity would have been able to both retain employees and to hire new employees in SRP territory, enabling SolarCity to continue the growth it had experienced in the years before the SEPPs were adopted, and hire new people to continue to expand its distributed solar business in other geographic markets.

SRP's Conduct Has No Legitimate Justification

126. SRP has asserted false or pretextual reasons for its conduct, most of which are versions of the argument that customers with distributed solar are "subsidized" by customers without distributed solar because the payments distributed solar customers make to SRP do not allow SRP to recover a sufficient

portion of SRP's fixed costs of offering service to those customers.

127. The fundamental premises of SRP's assertion are unsupportable. Rather than saddling other customers with additional costs, distributed solar benefits SRP and all its customers in numerous ways, including by reducing SRP's costs of generating power, distribution, and transmission. SRP's own history of supporting, purchasing, and subsidizing the purchase of solar energy shows that it recognizes the benefits to SRP and its customers of solar energy in general and distributed solar in particular.

128. SRP's justification also runs directly counter to the basic premise of the antitrust laws. As the United States Supreme Court reminded another utility that protested its antitrust liability, the law "assumes that an enterprise will protect itself against a loss by operating with superior service, lower costs, and improved efficiency"—not by using its market power to exclude competition by punishing customers who deal with competitors.

129. SRP erroneously asserts a supposed right to recover costs it chose to incur, or bad investment decisions it made. Pro-competitive responses to reduced demand include reducing unnecessary "fixed costs" by innovating or operating more efficiently. This type of "market discipline" protects against bad investment decisions and is fundamental to our economic system.

130. Nor is SRP undoing any "subsidy" to distributed solar customers. Instead, it charges distributed solar customers more for less service, or more for the same service, than other customers with the exact same usage characteristics. And it is

charging distributed solar customers far more than the amount of fixed costs that are attributable to such customers, while continuing to charge (subject to a significantly smaller $3 increase) all other customers a small fraction of the fixed costs attributable to their use of the SRP grid. As one SRP customer explained to SRP:

> "Non-generating customers SHOULD pay more of the costs of SRP's maintenance than solar-generating customers do since they use more energy than solar customers do, since they are not helping to reduce demand during peak summer season, when SRP can use the help and benefits from less reliance on the grid, and since they are contributing to greater environmental and health costs for our population through a heavier reliance on fossil fuels. This proposal makes it clear that SRP's goal is to discourage customers from creating their own electricity and to become the sole provider of solar electricity by making home solar economically unfeasible through this plan, but it is unfair to penalize those of us who have already taken on 20-year leases to do the right thing ....
>
> SRP says on its website that it supports solar power. What it obviously means is that it supports it *only* if it supplies it. Solar generation customers have taken on a financial burden for the life of their leases—many as much as 20 years—to do the right thing, take pressure off the grid during peak times, and create clean power to reduce pollution and other environmental costs. SRP could raise rates on all customers equally, but it is

> proposing instead to doubly burden those who have attempted to help safeguard our future by increasing their rates far greater than they have for traditional energy customers and ignoring the fact that many of those solar-generating customers have already taken on additional financial burdens to reduce stress on the electric grid."

131. The SEPPs' proposed Community Solar pricing also undermines SRP's arguments. The SEPPs' Community Solar price structure offers some customers Community Solar through a bill credit scheme that SRP says results in selling Community Solar power to those customers "at cost" to SRP. However, this "at cost" system keeps customers on the standard time-of-use pricing plan with no discriminatory service and demand charges. Thus, SRP has no problem with its existing, non-discriminatory rate structure so long as customers pay SRP for solar power. This fact was not lost on SRP's customers, one of whom noted to SRP:

> "[SRP's SEPP] loudly sings the praises of 'new' community-scale solar which would seem to offer the same panacea as was Roof Top Solar just a few short years ago. To read this section, one would be led to believe that Community Solar is completely different from Roof Top Solar. The truth is that, from the point of view of the Grid, they are exactly alike. All Solar generation suffers from intermittency; however that intermittency is strongly mitigated by spatial distribution."

132. In fact, there is zero or very little "subsidy" after all distributed solar's benefits to SRP are

appropriately considered. As another SRP customer put it:

> "A few years ago, I sat in the PERA Club in a most upbeat presentation from your staff on the great benefits of residential installations and how much SRP was behind their customers who were thinking of 'going solar'. What happened between then and now? How did incentives turn into disincentives in such a short period of time?
>
> Please don't quote the standard grid investment collapse arguments to explain this. These are at best inaccurate and at worst completely disingenuous. I pay for the generation, transmission, and distribution of the power that I get from SRP and any excess that I generate at any particular moment goes straight to my neighbors who pay YOU for it. Since their meters don't know where the power is coming from, they get charged for generation, transmission, and distribution for energy that didn't come from the grid. Is that fair? I should also note that in addition to taking the solar bait, I have replaced all my incandescent bulbs with low energy alternatives (also encouraged by SRP). Should I be paying more to you to cover the reduced transmission/distribution fee collection that this incurs? If I turn off the lights in my daughter's room after she has left, should I mail you a check? Ridiculous? Not if you think your residential solar penalties are appropriate."

133. That SRP's cross subsidy claim is pretextual is demonstrated by SRP's comfort with the large "cross subsidies" it will continue to provide when those subsidies do not arise from solar competition. For example, SRP customers who use natural gas appliances have less electricity demand from SRP, and any "fixed" costs attributable to them are therefore "subsidized" by others; SRP customers with winter homes in Arizona use far less electricity from SRP, and therefore are "subsidized" by others; SRP's existing customers "subsidize" customers in new homes, for whom SRP has to build out new lines; SRP's more rural customers, who cause SRP higher distribution and transmission costs than metropolitan customers, are "subsidized" by metropolitan customers; and SRP's customers who have taken steps other than installing competitive distributed solar to reduce the amount of electricity they demand from the grid are "subsidized" by those who consume more electricity.

134. In short, hundreds of thousands of SRP customers have electricity purchase or demand characteristics such that they are, under SRP's logic, being "subsidized" by other customers. Yet SRP's punitive new SEPPs do not apply to those customers. They apply only to those customers who obtain electricity from a competitive source such as distributed solar from SolarCity.

135. Moreover, the structure of the demand charges the SEPPs impose on distributed solar customers fatally undermine SRP's stated justifications for the plan. By imposing a demand charge based on the 30-minute period of highest usage at peak times in any given month, SRP's demand charge merely creates the incentive to mitigate 30-minute spikes in individual customer demand that do not necessarily correspond to

system-wide peak demand, and therefore are poorly correlated to any significant or demonstrable incremental fixed costs to begin with. Such a demand charge does little to affect customer behavior if the *next* largest 30-minute spike is not much smaller, as is likely the case for virtually all customers. Meanwhile, by reducing the per-kWh energy charge that applies to both peak usage and peak generation, the SEPPs *reduce* solar users' incentives to reduce peak demand overall.

136. SRP has deliberately designed its demand charge to be difficult—perhaps virtually impossible—to calculate, manage, know in advance, or even be likely to reduce peak demand. Asked why the SEPPs do not have any analogous "demand charge" for customers who do not use distributed solar, SRP's General Manager & Chief Executive Officer, Mark Bonsall, summed up the anti-consumer effect of the demand charge as follows:

> "I guess the bottom line on that is I think it would be very difficult, were she still with us, to put my grandma on a demand charge. I mean, we're gonna have people that just don't want to do that or it's too complicated for them to understand and/or they don't care about it. I think we need to be sensitive to some of those issues as well."

137. In short, SRP's demand charge is explicitly and unapologetically discriminatory. For the 98% of SRP customers who do not generate any rooftop solar electricity, SRP considers it infeasible for those customers to reduce their peak demand to reduce peak loads and mitigate draconian monthly bill impacts. SRP refuses to apply the same reasoning to distributed

solar customers. The conclusion is inescapable: SRP is more interested in punishing solar than actually reducing peak demand and managing SRP's grid-related costs.

138. Other utilities have been unable to prove similarly pretextual subsidy claims. For example, Arizona Public Service ("APS") has a service area adjacent to SRP's, but unlike SRP, is subject to regulation. APS asserted to its regulator that a $50 per month increase on distributed solar customers would remedy a supposed cross subsidy. The Commission eventually approved, on an interim basis, an approximately $5 increase as a compromise solution.

139. Finally, even were it the case (which it is not) that SRP's "cost-shifting" rationale had a rational basis, neither the discriminatory charges its SEPPs impose nor the exclusion of competition that has already resulted are necessary or reasonable ways to address it. Other price structures are readily available that non-discriminatorily charge for usage and demand at the peak times SRP says are critical to controlling its supposed "fixed costs" (many of which in fact have nothing to do with the relationship between distributed solar customers' usage and demand patterns).

140. A December 31, 2014 Standard and Poor's ratings summary for investors said nothing about distributed generation or exploding fixed costs as a reason for credit concern. To the contrary, the ratings company faulted SRP's reliance on expensive coal-fired assets (which represent "about 43% of the energy SRP sells" and which expose SRP to "higher capital investment needs and operating costs as emissions regulations," proving SRP's over-reliance on coal to be a bad decision), energy market volatility, and "the

recession's impact on electric demand." But Standard and Poor noted that all this was not too much cause for concern because "management's use of rate increases mitigates these credit concerns."

141. In short, all justifications that SRP management has asserted are objectively baseless.

142. For all the foregoing reasons, SRP's conduct was illegal and anticompetitive. Its true message to consumers could not be clearer: Consumers who want to choose an alternative technology cannot escape SRP's grip.

COUNT I:
MONOPOLY MAINTENANCE IN VIOLATION OF THE SHERMAN ANTITRUST ACT
(15 U.S.C. § 2)

143. SolarCity repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

144. SRP has engaged in anticompetitive conduct to maintain its monopoly power in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.

145. SRP's SEPPs constitute anticompetitive conduct and unlawful monopoly maintenance in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.

146. SRP possesses monopoly power in the relevant market or markets, and willfully maintains it, including through the imposition of SRP's SEPPs.

147. SRP's SEPPs have the purpose and effect of excluding competition from distributed solar, including

by actually foreclosing competition in the market and preventing entry.

148. SRP's continued anticompetitive conduct and maintenance of its monopoly power through its SEPPs is not the result of superior skill, business acumen, or historic accident.

149. As a direct and foreseeable result of SRP's monopoly maintenance, SolarCity has suffered damages in an amount to be proved at trial.

150. As a direct and foreseeable result of SRP's monopoly maintenance, SolarCity continues to suffer irreparable injury for which there is no adequate remedy at law.

151. SRP's monopoly maintenance is likely to continue if not enjoined.

COUNT II:
ATTEMPTED MONOPOLIZATION
IN VIOLATION OF THE SHERMAN ANTITRUST ACT
(15 U.S.C. § 2)

152. SolarCity repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

153. SRP has engaged in anticompetitive conduct to attempt to monopolize in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.

154. As an alternative to Count I, SRP's SEPPs constitute an unlawful attempt to monopolize in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.

155. Specifically, SRP's SEPPs constitute a willful and intentional attempt to monopolize the retail

market, by excluding competition from distributed solar.

156. SRP's attempt to monopolize has a dangerous probability of success.

157. As a direct and foreseeable result of SRP's attempt to monopolize, SolarCity has suffered damages in an amount to be proved at trial.

158. As a direct and foreseeable result of SRP's attempt to monopolize, SolarCity continues to suffer irreparable injury for which there is no adequate remedy at law.

159. SRP's attempt to monopolize is likely to continue if not enjoined.

COUNT III:
UNREASONABLE RESTRAINT OF TRADE IN VIOLATION OF THE SHERMAN ANTITRUST ACT
(15 U.S.C. § 1)

160. SolarCity repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

161. SRP's SEPPs constitute agreements that unreasonably restrain trade in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

162. These agreements have and will continue to have anticompetitive effects. They unlawfully insulate SRP from competition and exclude distributed solar companies from the retail market, including by actually foreclosing competition in the market and preventing entry, thereby allowing SRP to raise prices, harm the competitive process, raise barriers to entry and expansion, and retard innovation.

163. These agreements are not reasonably necessary to accomplish any of SRP's purported procompetitive goals. Any procompetitive benefit is outweighed by anticompetitive harm, and there are less restrictive alternatives by which SRP could reasonably achieve any procompetitive goal.

164. In addition, the agreements constitute a tying arrangement whereby SRP uses its appreciable market power in the grid access market to coerce purchases from SRP in the retail market (or, alternatively, to use its appreciable economic power in one retail sub-market to coerce the purchase of power from SRP in another sub-market), to the exclusion of a substantial amount of commerce in the retail market. These markets are separate markets, as is illustrated by the separate demand for the products and services in each.

165. As a direct and foreseeable result of SRP's willful imposition of these agreements, SolarCity has suffered damages in an amount to be proved at trial.

166. As a direct and foreseeable result of SRP's willful imposition of these agreements, SolarCity continues to suffer irreparable injury for which there is no adequate remedy at law.

167. SRP's imposition and enforcement of these agreements is likely to continue if not enjoined.

COUNT IV:
EXCLUSIVE DEALING
IN VIOLATION OF THE CLAYTON ANTITRUST ACT
(15 U.S.C. § 14)

168. SolarCity repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

169. Electricity is a commodity subject to Section 3 of the Clayton Antitrust Act, 15 U.S.C. § 14.

170. SRP's SEPPs constitute an exclusivity arrangement that unreasonably restrains trade in violation of Section 3 of the Clayton Antitrust Act, 15 U.S.C. § 14.

171. SRP's arrangement has and will continue to have anticompetitive effects. It unlawfully insulates SRP from competition and excludes distributed solar companies from the retail market, including by actually foreclosing competition in the market and preventing entry, thereby allowing SRP to raise prices, harm the competitive process, raise barriers to entry and expansion, and retard innovation.

172. SRP's exclusivity arrangement is not reasonably necessary to accomplish any of SRP's purported procompetitive goals. Any procompetitive benefit is outweighed by anticompetitive harm, and there are less restrictive alternatives by which SRP could reasonably achieve any procompetitive goal.

173. As a direct and foreseeable result of SRP's willful exclusivity arrangement, SolarCity has suffered damages in an amount to be proved at trial.

174. As a direct and foreseeable result of SRP's willful exclusivity arrangement, SolarCity continues to suffer irreparable injury for which there is no adequate remedy at law.

175. SRP's imposition and enforcement of its exclusivity arrangement is likely to continue if not enjoined.

COUNT V:
MONOPOLY MAINTENANCE
IN VIOLATION OF THE ARIZONA UNIFORM STATE ANTITRUST ACT
(A.R.S. § 44-1403)

176. SolarCity repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

177. SRP has engaged in anticompetitive conduct to maintain its monopoly over trade or commerce within Arizona in violation of A.R.S. § 44-1403.

178.SRP's SEPPs constitute anticompetitive conduct and unlawful monopoly maintenance in violation of A.R.S. § 44-1403.

179. SRP possesses monopoly power in the relevant market or markets, and willfully maintains it, including through the imposition of SRP's SEPPs.

180. SRP's SEPPs have the purpose and effect of excluding competition from distributed solar, including by actually foreclosing competition in the market and preventing entry.

181. SRP's continued anticompetitive conduct and maintenance of its monopoly power through its SEPPs is not the result of superior skill, business acumen, or historic accident.

182. SRP's conduct constituted a flagrant violation of A.R.S. § 44-1403.

183. As a direct and foreseeable result of SRP's monopoly maintenance, SolarCity has suffered damages in an amount to be proved at trial. As a direct and foreseeable result of SRP's monopoly maintenance,

SolarCity continues to suffer irreparable injury for which there is no adequate remedy at law.

184. SRP's monopoly maintenance is likely to continue if not enjoined.

COUNT VI:
ATTEMPTED MONOPOLIZATION
IN VIOLATION OF THE ARIZONA UNIFORM STATE ANTITRUST ACT
(A.R.S. § 44-1403)

185. SolarCity repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

186. As an alternative to Count V, SRP's SEPPs constitute an unlawful attempt to monopolize trade or commerce within Arizona in violation of A.R.S. § 44-1403.

187. Specifically, SRP's SEPPs constitute a willful and intentional attempt to monopolize the retail market, by excluding competition from distributed solar.

188. SRP's attempt to monopolize has a dangerous probability of success.

189. SRP's conduct constituted a flagrant violation of A.R.S. § 44-1403.

190. As a direct and foreseeable result of SRP's attempt to monopolize, SolarCity has suffered damages in an amount to be proved at trial.

191. As a direct and foreseeable result of SRP's attempt to monopolize, SolarCity continues to suffer irreparable injury for which there is no adequate remedy at law.

192. SRP's attempt to monopolize is likely to continue if not enjoined.

COUNT VII:
UNREASONABLE RESTRAINT OF TRADE IN VIOLATION OF THE ARIZONA UNIFORM STATE ANTITRUST ACT
(A.R.S. § 44-1402)

193. SolarCity repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

194. SRP's SEPPs constitute agreements that unreasonably restrain trade within Arizona in violation of A.R.S. § 44-1402.

195. These agreements have and will continue to have anticompetitive effects. They unlawfully insulate SRP from competition and exclude distributed solar companies from the retail market, including by actually foreclosing competition in the market and preventing entry, thereby allowing SRP to raise prices, harm the competitive process, raise barriers to entry and expansion, and retard innovation.

196. These agreements are not reasonably necessary to accomplish any of SRP's purported procompetitive goals. Any procompetitive benefit is outweighed by anticompetitive harm, and there are less restrictive alternatives by which SRP could reasonably achieve any procompetitive goal.

197. In addition, the agreements constitute a tying arrangement whereby SRP uses its appreciable market power in the grid access market to coerce purchases from SRP in the retail market (or, alternatively, to use its appreciable economic power in one retail sub-market to coerce the purchase of power from SRP in

another sub-market), to the exclusion of a substantial amount of commerce in the retail market. These markets are separate markets, as is illustrated by the separate demand for the products and services in each.

198. SRP's conduct constituted a flagrant violation of A.R.S. § 44-1402.

199. As a direct and foreseeable result of SRP's willful imposition of these agreements, SolarCity has suffered damages in an amount to be proved at trial.

200. As a direct and foreseeable result of SRP's willful imposition of these agreements, SolarCity continues to suffer irreparable injury for which there is no adequate remedy at law.

201. SRP's imposition and enforcement of these agreements is likely to continue if not enjoined.

COUNT VIII:
INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

202. SolarCity repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

203. SolarCity has and had an expectancy in continuing advantageous economic relationships with current and prospective customers in SRP's service area, including Maricopa Community Colleges, the City of Mesa, and the City of Tempe, and at least 500 additional specific customers who did not move forward with SolarCity as a result of SRP's conduct with respect to the SEPPs' design, announcement, and imposition.

204. SRP had knowledge of these economic relationships and intended to interfere with and disrupt

them by wrongfully designing, announcing, and imposing the SEPPs in a way that destroyed these relationships' economic value, thereby causing breaches in the relationships.

205. SRP's intentional interference was improper in both motive and means.

206. Any interests that SRP purports to advance through its intentional interference are pretextual.

207. As a direct and foreseeable result of SRP's intentional interference, SolarCity has suffered damages in an amount to be proved at trial.

208. As a direct and foreseeable result of SRP's intentional interference, SolarCity continues to suffer irreparable injury for which there is no adequate remedy at law.

209. SRP's intentional interference is likely to continue if not enjoined.

COUNT IX:
INTENTIONAL INTERFERENCE WITH CONTRACT

210. SolarCity repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

211. In the months and weeks prior to SRP's release of its SEPPs, SolarCity entered into contractual relationships with customers in SRP's service area, including numerous 20-year leases.

212. SRP had knowledge of these contractual relationships and intended to interfere with and disrupt them by wrongfully designing, announcing, and imposing the SEPPs in a way that destroyed these

relationships' economic value, thereby causing breaches in the relationships.

213. SRP's intentional interference was improper in both motive and means.

214. Any interests that SRP purports to advance through its intentional interference are pretextual.

215. As a direct and foreseeable result of SRP's intentional interference, SolarCity has suffered damages in an amount to be proved at trial.

216. As a direct and foreseeable result of SRP's intentional interference, SolarCity continues to suffer irreparable injury for which there is no adequate remedy at law.

217. SRP's intentional interference is likely to continue if not enjoined.

REQUEST FOR RELIEF

218. SolarCity repeats and re-alleges the allegations contained in each and every preceding paragraph of this Complaint.

219. SolarCity requests that this Court render the following relief:

a. Grant judgment in favor of SolarCity and against Defendants;

b. Grant all appropriate injunctive relief;

c. Award SolarCity an appropriate amount in monetary damages as determined at trial, including pre- and post-judgment interest;

d. Award SolarCity treble damages in an amount to be proved at trial;

e. Award SolarCity attorneys' fees and the costs of bringing this action; and

f. Grant SolarCity such other relief as is just and appropriate.

JURY TRIAL DEMANDED

Pursuant to Fed. R. Civ. P. 38(b), SolarCity demands a trial by jury of all of the claims asserted in this Complaint so triable.

Respectfully submitted,

BOIES, SCHILLER & FLEXNER LLP

s/Steven C. Holtzman
BOIES, SCHILLER & FLEXNER LLP
Attorneys for Plaintiff SolarCity Corporation

No. 17-368

IN THE

Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Petitioner,

v.

SOLARCITY CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

CHRISTOPHER E. BABBITT
DANIEL S. VOLCHOK
DAVID M. LEHN
DAVID GRINGER
DANIEL WINIK
ARPIT K. GARG
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

MOLLY S. BOAST
Counsel of Record
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007
(212) 230-8800
molly.boast@wilmerhale.com

CHRISTOPHER T. CASAMASSIMA
WILMER CUTLER PICKERING HALE AND DORR LLP
350 S. Grand Ave.
Los Angeles, CA 90071
(213) 443-5300

QUESTION PRESENTED

Whether orders denying state-action immunity to public entities are immediately appealable under the collateral-order doctrine.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 4

JURISDICTION 5

STATUTORY PROVISION INVOLVED 5

STATEMENT 5

A. The District 5

B. The 2015 Ratemaking 7

C. District Court Proceedings 8

D. Ninth Circuit Proceedings 10

SUMMARY OF ARGUMENT 12

ARGUMENT 14

ORDERS DENYING STATE-ACTION IMMUNITY TO PUBLIC ENTITIES ON LEGAL GROUNDS QUALIFY FOR IMMEDIATE APPEAL UNDER THE COLLATERAL-ORDER DOCTRINE 14

A. The Class Of Orders At Issue Is Conclusive 15

B. The Question Of State-Action Immunity Is Separate From The Merits Of An Antitrust Claim 18

C. Orders Denying State-Action Immunity To Public Entities Are Effectively Unreviewable After Final Judgment 27

TABLE OF CONTENTS—Continued

Page

1. An order is effectively unreviewable if delaying an appeal would imperil a sufficiently important interest 28
2. State-action immunity implicates important public interests that this Court has held sufficient to justify interlocutory appeal 31
3. Lower courts' reasons for rejecting effective unreviewability in this context are unpersuasive 39

D. The Additional Arguments That SolarCity And The Government Offered Below Fail 43

CONCLUSION 47

TABLE OF AUTHORITIES

CASES

Page(s)

Abney v. *United States*, 431 U.S. 651 (1977) 28

Alden v. *Maine*, 527 U.S. 706 (1999) 46

Ashcroft v. *Iqbal*, 556 U.S. 662 (2009) 18, 36, 37

Ball v. *James*, 451 U.S. 355 (1981) 5, 6, 25

Bell Atlantic Corp. v. *Twombly*, 550 U.S. 544 (2007) 37

California CNG, Inc. v. *Southern California Gas Co.*, 96 F.3d 1193 (9th Cir. 1996) 20

California Retail Liquor Dealers Association v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) 23

City of Columbia v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991) 20, 33

City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978) 34

City of Mesa v. *Salt River Project Agricultural Improvement & Power District*, 373 P.2d 722 (Ariz. 1962) 25

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) 1, 15

Columbia Steel Casting Co. v. *Portland General Electric Co.*, 111 F.3d 1427 (9th Cir. 1996) 10

Community Communications Co. v. *City of Boulder*, 455 U.S. 40 (1982) 33

TABLE OF AUTHORITIES—Continued

Page(s)

Commuter Transportation Systems, Inc. v. *Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986) 16, 38

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 2, 14, 20, 25

Crawford-El v. *Britton*, 523 U.S. 574 (1998) 43

Cunningham v. *Hamilton County*, 527 U.S. 198 (1999) 14

Digital Equipment Corp. v. *Desktop Direct, Inc.*, 511 U.S. 863 (1994) 5, 14, 29, 30

Exxon Corp. v. *Governor of Maryland*, 437 U.S. 117 (1978) 33

FTC v. *Phoebe Putney Health System, Inc.*, 568 U.S. 216 (2013) ..... *passim*

FTC v. *Ticor Title Insurance Co.*, 504 U.S. 621 (1992) 33, 46

Gorenc v. *Salt River Project Agricultural Improvement & Power District*, 869 F.2d 503 (9th Cir. 1989) 5

Gulfstream Aerospace Corp. v. *Mayacamas Corp.*, 485 U.S. 271 (1988) 3, 15, 16, 17

Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 36

Helstoski v. *Meanor*, 442 U.S. 500 (1979) 28

Hohokam Irrigation & Drainage District v. *Arizona Public Service Co.*, 64 P.3d 836 (Ariz. 2003) (en banc) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Huron Valley Hospital, Inc. v. *City of Pontiac*, 792 F.2d 563 (6th Cir. 1986) 26, 27, 39, 40, 41

Illinois v. *Gates*, 462 U.S. 213 (1983) 15

Jett v. *Dallas Independent School District*, 491 U.S. 701 (1989) 18

Johnson v. *Jones*, 515 U.S. 304 (1995) 15, 23

Lauro Lines s.r.l. v. *Chasser*, 490 U.S. 495 (1989) 29

Martin v. *Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996) 16

Mercantile National Bank v. *Langdeau*, 371 U.S. 555 (1963) 26

Midland Asphalt Corp. v. *United States*, 489 U.S. 794 (1989) 30

Mitchell v. *Forsyth*, 472 U.S. 511 (1985) ..... *passim*

Mohawk Industries, Inc. v. *Carpenter*, 558 U.S. 100 (2009) ..... *passim*

Mothershed v. *Justices of the Supreme Court*, 410 F.3d 602 (9th Cir. 2005) 10

Nixon v. *Fitzgerald*, 457 U.S. 731 (1982) 28, 31

North Carolina State Board of Dental Examiners v. *FTC*, 135 S. Ct. 1101 (2015) 22, 33, 34, 46

Ortiz v. *Jordan*, 562 U.S. 180 (2011) 3, 24

Osborn v. *Haley*, 549 U.S. 225 (2007) 20, 21, 39, 40

Parker v. *Brown*, 317 U.S. 341 (1943) 2, 9, 32, 33, 46

Patrick v. *Burget*, 486 U.S. 94 (1988) 23, 34

TABLE OF AUTHORITIES—Continued

Page(s)

Puerto Rico Aqueduct & Sewer Authority v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 31, 35

Quackenbush v. *Allstate Insurance Co.*, 517 U.S. 706 (1996) 40

Raygor v. *Regents of the University of Minnesota*, 534 U.S. 533 (2002) 43

Richardson-Merrell, Inc. v. *Koller*, 472 U.S. 424 (1985) 17

Salt River Project Agricultural Improvement & Power District v. *City of Phoenix*, 631 P.2d 553 (Ariz. Ct. App. 1981) 6

Sell v. *United States*, 539 U.S. 166 (2003) 40

Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 35

Shames v. *California Travel & Tourism Commission*, 626 F.3d 1079 (9th Cir. 2010) 22

Smith v. *Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586 (9th Cir. 1997) 6

South Carolina State Board of Dentistry v. *FTC*, 455 F.3d 436 (4th Cir. 2006) 16, 25, 26, 40, 41, 42

Southern Motor Carriers Rate Conference, Inc. v. *United States*, 471 U.S. 48 (1985) 9, 20

Stack v. *Boyle*, 342 U.S. 1 (1951) 28

Swint v. *Chambers County Commission*, 514 U.S. 35 (1995) 17, 18

Town of Hallie v. *Eau Claire*, 471 U.S. 34 (1985) 2, 16, 20, 34

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Mississippi*, 380 U.S. 128 (1965) 35

Van Cauwenberghe v. *Biard*, 486 U.S. 517 (1988) 14, 26, 28, 29

Will v. *Hallock*, 546 U.S. 345 (2006) ..... *passim*

CONSTITUTIONAL AND STATUTORY PROVISIONS

Ariz. Const. art. XIII, §7 5

Ariz. Rev. Stat.
- §12-820.01 11
- §30-801 7
- §30-802 7
- §30-811 7
- §30-812 7
- §48-2302 ..... 5, 25
- §48-2309 6
- §48-2334 7
- §48-2335 6
- §48-2336 6
- §48-2340 6
- §48-2341 6
- §§48-2361 to -2368 6
- §48-2383 6
- §§48-2411 to -2415 6

28 U.S.C.
- §1254 5
- §1291 ..... 1, 5, 17
- §1292 ..... 10, 44, 45

42 U.S.C. §1983 17

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

Areeda, Phillip E. & Herbert Hovenkamp, *Fundamentals of Antitrust Law* (4th ed. & 2015 Supp.) 38

Arizona Corporation Commission, *In re Arizona Public Service Commission's Application for Approval of Net Metering Cost Shift Solution*, No. E-01345A-13-0248, Decision 74202 (2013) 8

Arizona Corporation Commission, *In re the Commission's Investigation of Value and Cost of Distributed Generation*, No. E-00000J-14-0023, Decision 75859 (2017) 8

Brief for the United States as Amicus Curiae, *Parker* v. *Brown*, No. 46 (U.S. Oct. 1942) 32

Federal Rule of Evidence 201 8

Manual for Complex Litigation, Fourth (2004) 37, 38

Massachusetts Institute of Technology Energy Initiative, *The Future of Solar Energy* (2015) 8

Wagener, William H., Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887 (2003) 37

IN THE

Supreme Court of the United States

No. 17-368

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Petitioner,

v.

SOLARCITY CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

INTRODUCTION

Under 28 U.S.C. §1291, the courts of appeals "have jurisdiction of appeals from all final decisions of the district courts." This Court has long held that although "'final decisions' typically are ones that trigger the entry of judgment, they also include a small set of prejudgment orders that are 'collateral to' the merits of an action and 'too important' to be denied immediate review." *Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100, 103 (2009) (quoting *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)). For example, the Court has allowed immediate appeal under this rule—known as the collateral-order doctrine—from district-

court orders denying Eleventh Amendment immunity, qualified immunity, absolute immunity, and immunity under the Speech or Debate Clause.

The question in this case is whether collateral-order appeal is likewise available from an order rejecting, on legal grounds, a public entity's claim of state-action immunity. That immunity, which this Court first recognized in *Parker* v. *Brown*, 317 U.S. 341 (1943), bars antitrust claims against states for acts taken in their sovereign capacity, *see id.* at 350-352. It also bars antitrust claims against other electorally accountable public entities (typically political subdivisions of states) that "act[] pursuant to a clearly articulated and affirmatively expressed state policy to displace competition." *FTC* v. *Phoebe Putney Health System, Inc.*, 568 U.S. 216, 219 (2013).[1]

Orders denying state-action immunity to public entities on legal grounds satisfy each of the three criteria for immediate appeal under the collateral-order doctrine: conclusiveness, separateness from the underlying merits, and effective unreviewability after final judgment, *see Mohawk*, 558 U.S. at 105.

First, such orders "conclusively determine the disputed question," *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). In fact, although the courts of appeals are divided on the answer to the question pre-

[1] Private entities (and public ones that are not electorally accountable) can enjoy state-action immunity if, in addition to acting pursuant to a clearly articulated state policy, they are "actively supervised by the State." *Phoebe Putney*, 586 U.S. at 225. Electorally accountable public entities like the District "are not subject to the 'active state supervision requirement' because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *Id.* at 226 (quoting *Town of Hallie* v. *Eau Claire*, 471 U.S. 34, 46 (1985)).

sented here, no court has held that an order denying state-action immunity to a public entity on legal grounds fails to satisfy the conclusiveness requirement. For good reason: Legal rulings, "although technically amendable, are made with the expectation that they will be the final word on the subject addressed," *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 277 (1988).

Second, the analysis of state-action immunity is separate from the merits of the underlying antitrust claim. To resolve a state-action-immunity claim like the District's, the court must determine, as noted, whether the defendant acted pursuant to a clearly articulated state policy. That "purely legal issue," *Ortiz* v. *Jordan*, 562 U.S. 180, 188 (2011), is resolved by analyzing the state laws under which the defendant acted. The merits of the underlying antitrust claims will turn on different questions, such as what conduct actually occurred and whether it was impermissibly anticompetitive. A court does not answer those questions in resolving a state-action-immunity claim. To the contrary, as in the qualified-immunity context, *see Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985), a court adjudicating a claim of state-action immunity assumes that the complaint states a valid claim.

Finally, an order denying state-action immunity to a public entity on legal grounds is effectively unreviewable after final judgment. "[T]he decisive consideration" in applying this requirement "is whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" *Mohawk*, 558 U.S. at 107 (quoting *Will* v. *Hallock*, 546 U.S. 345, 352-353 (2006)). Orders denying state-action immunity to public entities meet this standard for the same reasons that this Court has

held orders denying other immunities to public entities or officials do so. Specifically, like Eleventh Amendment immunity, state-action immunity serves to protect states' dignity and autonomy, including their "freedom ... to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws," *Phoebe Putney*, 568 U.S. at 226 (omission in original). State-action immunity also serves the related purpose of avoiding undue federal intrusion on the states. And like qualified immunity, state-action immunity protects states and their citizens against unwarranted disruption of governmental functions, ensuring that public servants exercise their policymaking discretion without fear of being subjected to protracted litigation. As the Court has recognized with qualified immunity and Eleventh Amendment immunity, all these interests are irredeemably compromised by requiring a defendant to litigate to final judgment before having the opportunity to appeal a district court's rejection of state-action immunity.

In short, orders denying state-action immunity to public entities on legal grounds fall within the collateral-order doctrine because they implicate important public concerns that this Court has previously deemed sufficient to warrant immediate appeal. The Ninth Circuit's contrary conclusion should be reversed.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 859 F.3d 720. The unpublished memorandum that the court issued concurrently with its published opinion (Pet. App. 19a-20a) is reported at 692 F. App'x 458. The district court's two relevant orders—denying dismissal of the complaint based on state-action immunity (Pet. App. 37a-69a) and refusing

to certify that denial for interlocutory appeal (Pet. App. 21a-35a)—are unreported but available at 2015 WL 6503439 and 2015 WL 9268212, respectively.

JURISDICTION

The court of appeals entered judgment on June 12, 2017. The petition for certiorari was timely filed on September 7, 2017. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

This Court has described the collateral-order doctrine as a "practical construction" of 28 U.S.C. §1291. *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). Section 1291 states in relevant part: "The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ... except where a direct review may be had in the Supreme Court."

STATEMENT

A. The District

1. Petitioner, the Salt River Project Agricultural Improvement and Power District, is a governmental entity that was formed in 1937. *See generally Ball* v. *James*, 451 U.S. 355, 357-359 (1981) (discussing the District's history). Today, the District remains "a public, political, taxing subdivision of" Arizona. Ariz. Rev. Stat. §48-2302. Under the state constitution, the District is, with exceptions not relevant here, "entitled to the immunities and exemptions granted municipalities and political subdivisions under [the] constitution or any law of the state or of the United States." Ariz. Const. art. XIII, §7, *quoted in Hohokam Irrigation &*

Drainage District v. *Arizona Public Service Co.*, 64 P.3d 836, 839 (Ariz. 2003) (en banc).

The District is overseen by elected officials, including a president, a vice president, a fourteen-person board of directors, and a thirty-person council. *Smith* v. *Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586, 589 (9th Cir. 1997) (citing Ariz. Rev. Stat. §§48-2361 to -2368). Individuals who both own land within the District's boundaries and are eligible to vote in state elections can vote in District elections and serve in District offices. Ariz. Rev. Stat. §§48-2309, -2383.

As it has for decades, the District serves as an electric utility—currently providing power to roughly a million members of the public in metropolitan Phoenix. *See Ball*, 451 U.S. at 357; Pet. App. 39a. It also delivers water throughout a 375-square-mile area of central Arizona. *See Ball*, 451 U.S. at 357. "The fact that the Salt River Project sells surplus power as a revenue source in its proprietary capacity," Arizona courts have held, "does not defeat its status as a ... political subdivision of the state." *Salt River Project Agricultural Improvement & Power District* v. *City of Phoenix*, 631 P.2d 553, 555 (Ariz. Ct. App. 1981) (citing Arizona Supreme Court precedent).

Arizona has given the District "many governmental powers," including the authority to "establish and enforce laws, rules, and regulations necessary to carry on the District's business, construct works for irrigation, drainage, and power, levy taxes on real property within the District, sell tax-exempt bonds, and exercise the power of eminent domain." *Smith*, 109 F.3d at 589 (citing Ariz. Rev. Stat. §§48-2335, -2336, -2340, -2341(B), -2411 to -2415); *see also Gorenc* v. *Salt River*

Project Agricultural Improvement & Power District, 869 F.2d 503, 507 (9th Cir. 1989) (District possesses "attributes of a sovereign in that it can levy [property] taxes ..., sell tax-exempt bonds, exercise eminent domain, and is immune from taxation on the sale of electricity" (citation omitted)). Of particular relevance here, the state has given the District's elected Board ratemaking power, i.e., the authority—as a "public power entity"—to "determine terms and conditions for competition in the retail sale of electric generation service," including "distribution service rates and charges." Ariz. Rev. Stat. §30-802(A), (B); *see also id.* §30-801(16) (defining "[p]ublic power entity"). The state has also prescribed notice-and-comment procedures for the District and other public power entities to follow in exercising their ratemaking authority, *see id.* §48-2334(B), (E), along with two separate mechanisms for anyone dissatisfied with the setting of rates to seek redress in state court, *see id.* §§30-811(A), 30-812(A).

B. The 2015 Ratemaking

In 2014, the District announced that it was considering a revised rate structure, including new rates for its thousands (Dist. Ct. Dkt. 232-21) of "self-generating customers." Those are customers who generate electricity through rooftop solar systems or other alternative means, but who still need to buy electricity from the District when those alternatives are insufficient to meet their needs. Pet. App. 40a-41a. The District's announcement came amid a nationwide increase in the number of self-generating customers, which posed well-recognized challenges to utilities seeking to price electricity fairly (for example, pricing it in a way that ensures each class of customers pays its share of the costs of maintaining the electrical grid). *See generally, e.g.*,

Massachusetts Institute of Technology Energy Initiative, *The Future of Solar Energy* xviii (2015), *available at* https://goo.gl/BV4CMg.[2]

After holding public hearings and receiving comments, the District's Board promulgated revised rates in 2015, including a new rate plan for future self-generating customers. Pet. App. 41a. A document the District issued in connection with this plan explained that the plan was meant to address, among other things, concerns that self-generating customers do not "pay an equal share for th[e] fixed costs" of maintaining the electrical grid, forcing the District's "non-solar customers" to "shoulder[]" "[t]he costs solar customers are ... avoiding." C.A. Dkt. 34-3, at 6.[3]

C. District Court Proceedings

1. Respondent SolarCity Corporation sold and leased rooftop solar systems to customers in the District and elsewhere. Pet. App. 2a-3a. Claiming that the

---

[2] The Arizona Corporation Commission, which regulates the state's private utilities, has recognized such challenges. In 2013, it found that the proliferation of solar installations "results in a cost shift" from solar customers to non-solar customers. Arizona Corporation Commission, *In re Arizona Public Service Commission's Application for Approval of Net Metering Cost Shift Solution*, No. E-01345A-13-0248, Decision 74202 ¶49, at 13 (2013), *available at* https://goo.gl/PVBeHD. In light of this, the Commission last year authorized the utilities it regulates (which do not include public power entities like the District) to treat solar customers as a separate class for rate-setting purposes. *See* Arizona Corporation Commission, *In re the Commission's Investigation of Value and Cost of Distributed Generation*, No. E-00000J-14-0023, Decision 75859 (2017), *available at* https://goo.gl/nQnhZ8.

[3] This Court can take judicial notice of the undisputed fact that the District made the statements in this public document (though not the truth of those statements). *See* Fed. R. Evid. 201.

District's 2015 rate plan diminished demand for its products, SolarCity—forgoing the mechanisms that Arizona law provides for judicial review of electricity rate-setting, *see supra* p.7—filed this action in federal court. Pet. App. 3a.

The operative complaint alleges that the District's conduct in adopting the 2015 rate plan violates federal antitrust law because it constitutes unlawful monopoly maintenance, attempted monopolization, an unreasonable restraint of trade, and exclusive dealing. Pet. App. 41a. SolarCity also brought claims under Arizona's antitrust statute and common law. Pet. App. 41a-42a.

The District moved to dismiss the complaint, arguing among other things that SolarCity's antitrust claims are barred by the doctrine of state-action immunity. Pet. App. 2a. As explained, under that doctrine antitrust law does not "bar States from imposing market restraints 'as an act of government.'" *Phoebe Putney*, 568 U.S. at 224 (quoting *Parker*, 317 U.S. at 352). The District argued that it was entitled to state-action immunity as a political subdivision of Arizona because it acted "pursuant to state policy to displace competition with regulation or monopoly public service," *id.* at 225. In particular, it contended that the challenged conduct is its ratemaking and that Arizona, by delegating ratemaking authority to the District's Board, clearly articulated a policy of allowing that conduct, even if competition was consequently displaced. Pet. App. 45a; *see Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 64 (1985) (the "rate-setting process" is "inherently anticompetitive"). The District's arguments encompassed not only SolarCity's federal antitrust claims but also its state-law ones, because Arizona antitrust law incorporates state-

action immunity. *See Mothershed* v. *Justices of the Supreme Court*, 410 F.3d 602, 609 (9th Cir. 2005).

2. The district court granted the District's motion to dismiss in part and denied it in part, Pet. App. 69a—including rejecting the District's assertion of state-action immunity, Pet. App. 67a.

The court initially held that it could not determine whether the District was entitled to the immunity without making factual determinations that were inappropriate on a motion to dismiss. Pet. App. 67a. More specifically, the court held (as relevant here) that it could not resolve at that stage "whether Arizona ha[d] articulated a clear policy permitting anticompetitive conduct in the retail electricity market." *Id.*

The District then moved for certification of an interlocutory appeal under 28 U.S.C. §1292(b). The district court denied that motion, but in doing so it acknowledged an "error" in its prior ruling, recognizing that whether the clear-articulation prong of state-action immunity is satisfied is a "'question ... of law,'" not a question of fact. Pet. App. 25a (quoting *Columbia Steel Casting Co.* v. *Portland General Electric Co.*, 111 F.3d 1427, 1442 (9th Cir. 1996)). The court thus rejected the District's claim of state-action immunity on the ground that, as a matter of law, "Arizona has not expressly articulated a clear policy authorizing the conduct of the District." *Id.*

D. Ninth Circuit Proceedings

The District appealed, asserting as a basis for appellate jurisdiction that the denial of its state-action-immunity defense was immediately appealable under the collateral-order doctrine. Pet App. 2a, 6a; Dist. Ct. Dkt. 81.

After briefing and argument, the Ninth Circuit dismissed the District's appeal for lack of jurisdiction, holding that orders denying state-action immunity fall outside the collateral-order doctrine. Pet. App. 17a. The court did not reach two of the doctrine's three prerequisites, conclusiveness and separateness, instead resting its holding on the ground that denials of state-action immunity to public entities are not effectively unreviewable after final judgment. Pet. App. 11a n.4.

The court of appeals recognized that under the collateral-order doctrine, immediate appeals are allowed from the "denial[] of certain particularly important immunities," including Eleventh Amendment immunity, absolute immunity, qualified immunity, foreign sovereign immunity, and tribal sovereign immunity. Pet. App. 7a-8a. But it reasoned that state-action immunity, unlike those others, is a defense against liability rather than an immunity from suit. Pet. App. 8a-11a. And "[u]nlike immunity from suit," the court opined, "immunity from liability can be protected by a post-judgment appeal." Pet. App. 8a.[4]

The Ninth Circuit subsequently denied the District's motion to stay the issuance of the court's mandate pending the filing and disposition of a petition for a writ of certiorari, and hence proceedings in the district court resumed. But after this Court granted certiorari, the district court vacated the scheduled trial date and otherwise stayed further proceedings pending this Court's decision. Dist. Ct. Dkt. 334.

---

[4] In an unpublished memorandum issued concurrently with its published opinion, the court of appeals held that it lacked jurisdiction to consider the District's alternative arguments for dismissal of the complaint under Arizona Revised Statutes §12-820.01 and the filed-rate doctrine. Pet. App. 20a. Those rulings are not before this Court.

SUMMARY OF ARGUMENT

Orders denying state-action immunity to public entities on legal grounds satisfy all three predicates for immediate appeal under the collateral-order doctrine: They are conclusive, separate from the merits, and effectively unreviewable on appeal from a final judgment.

A. Such orders satisfy the conclusiveness requirement because they are legal rulings, which district courts do not ordinarily revisit as litigation processes.

In opposing certiorari, SolarCity argued that the particular order denying immunity in this case was not conclusive because the district court expressed a willingness to revisit it at a later stage. The collateral-order analysis, however, determines the appealability not of a particular order but of a class of orders, and the conclusiveness prong accordingly focuses not on whether a particular judge expects to revisit a particular order but on whether judges generally revisit orders of that type. There can be no doubt that orders denying state-action immunity as a matter of law are generally final, which is why every court of appeals to have considered the question has held that they are conclusive for purposes of collateral-order review.

B. The class of orders at issue also satisfies the separateness requirement, whether the order rests on the absence of clear articulation (as in this case) or the absence as a matter of law of active supervision (which is required of private entities as well as public entities that, unlike the District, lack electoral accountability).

The clear-articulation analysis has nothing to do with the merits of the underlying antitrust claim; in fact, a court conducting that analysis *assumes* the defendant's alleged conduct occurred and was anticompet-

itive. The court instead addresses whether the conduct was authorized by state laws or regulations that inherently or foreseeably displace competition. A court conducting that analysis must of course take note of the factual allegations in a particular case (as is true with other immunities where immediate appeal is allowed), but only to understand what the defendant is accused of doing and thus to determine whether state law authorized that alleged conduct. The Court has held in the qualified-immunity context that such limited overlap with the merits is not enough to defeat separateness.

Legal rulings that active supervision is absent (in cases where it is required) similarly turn on an analysis of the relevant state-law authorities and not on the merits of the underlying antitrust claims.

C. The orders at issue are effectively unreviewable on appeal from a final judgment.

As this Court's recent collateral-order cases make clear, the key factor in the effective-unreviewability analysis is whether denying immediate appeal would threaten a sufficiently important interest. State-action immunity implicates two interests that this Court has recognized as important enough to justify immediate appeal. Like Eleventh Amendment immunity, state-action immunity protects states' dignitary interests. It flows from state sovereignty, and it maintains the boundary between federal antitrust regulation and states' prerogative to regulate their own economies as they see fit. And like qualified immunity, state-action immunity gives state and local policymakers the freedom to exercise their discretion in service of the public interest, rather than with an eye toward avoiding the potentially crippling burdens of litigation. These interests are irreversibly compromised by requiring the de-

fendant to litigate to final judgment before having the opportunity to appeal an erroneous denial of immunity.

ARGUMENT

ORDERS DENYING STATE-ACTION IMMUNITY TO PUBLIC ENTITIES ON LEGAL GROUNDS QUALIFY FOR IMMEDIATE APPEAL UNDER THE COLLATERAL-ORDER DOCTRINE

This Court has long held that "an appeal ordinarily will not lie until after final judgment has been entered in a case." *Cunningham* v. *Hamilton County*, 527 U.S. 198, 203 (1999). But it has also long held that this rule, though "serv[ing] several salutary purposes," *id.*, is not absolute. In particular, a district court's interlocutory order may be appealed immediately under the collateral-order doctrine if the order: (1) is "conclusive" of the relevant issue, (2) "resolve[s] [an] important question[] separate from the merits," and (3) is "effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk*, 558 U.S. at 106.

In determining whether these prerequisites are satisfied, courts do not "engage in an 'individualized jurisdictional inquiry.'" *Mohawk*, 558 U.S. at 107 (quoting *Coopers & Lybrand*, 437 U.S. at 473). Instead, they "focus ... on 'the entire category to which a claim belongs,'" i.e., "the class of claims, taken as a whole." *Id.* (quoting *Digital Equipment*, 511 U.S. at 868). Courts also "assume" that the defendant "has presented a substantial claim of immunity ... that warrants appellate consideration." *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 524 (1988).

Here, the relevant class comprises orders that deny state-action immunity to public entities on legal grounds. Such orders satisfy all three of the collateral-order doctrine's requirements. The contrary judgment

of the court of appeals should be reversed and the case remanded for that court to determine whether the District is entitled to state-action immunity.

A. The Class Of Orders At Issue Is Conclusive

1. For an interlocutory ruling to be appealable as a collateral order, it must "conclusively determine the disputed question." *Will*, 546 U.S. at 349. This requirement ensures that a district court's decisionmaking is "fully consummated," "concluded[,] and closed," as opposed to merely "tentative, informal, or incomplete." *Cohen*, 337 U.S. at 546. That, in turn, ensures that "appellate review is likely needed" to resolve the dispute. *Johnson* v. *Jones*, 515 U.S. 304, 311 (1995).[5]

In applying the conclusiveness requirement, this Court has "contrasted two kinds of nonfinal orders": those that are "inherently tentative" and "those that, although technically amendable, are made with the expectation that they will be the final word on the subject addressed." *Gulfstream*, 485 U.S. at 277 (quotation marks omitted). The latter are "conclusive" for purposes of the collateral-order doctrine. *Id.*

Orders denying state-action immunity on legal grounds fall in that latter category, i.e., they are not "inherently tentative" but rather made "with the expectation that they will be the final word" on the issue,

---

[5] As noted, the Ninth Circuit did not reach the conclusiveness requirement, or the separateness requirement addressed in the next subsection. Pet. App. 11a n.4. But the parties briefed both requirements in the court of appeals, as well as at the petition stage in this Court. This Court therefore can address all three requirements. *See Illinois* v. *Gates*, 462 U.S. 213, 218-221 (1983) (the Court can consider issues "pressed or passed upon" below). It should do so because all three are components of the question presented.

Gulfstream, 485 U.S. at 277. That is clear from the purely legal nature of such orders. As this Court has explained in allowing collateral-order appeal in the qualified-immunity context, a district court does not ordinarily revise a legal determination as litigation progresses, because generally "there will be nothing in the subsequent course of the proceedings in the district court that can alter the district court's conclusion." *Mitchell*, 472 U.S. at 527. Unlike the fact-based abstention denial at issue in *Gulfstream*, for example, there are typically no "further developments," 485 U.S. at 278, that would lead a district court to reconsider its legal rulings. Indeed, even SolarCity conceded in its Ninth Circuit brief here (at 21) that an order "turn[ing] on a purely legal issue" is conclusive.

That is the type of order at issue in this case. Applying the clear-articulation prong of the state-action immunity standard involves examining state law to determine whether "the anticompetitive effect [of the challenged conduct] was the 'foreseeable result' of what the State authorized." *Phoebe Putney*, 568 U.S. at 226-227 (quoting *Town of Hallie*, 471 U.S. at 42). And just as with denials on legal grounds of qualified immunity, a denial on such grounds of state-action immunity "finally and conclusively determines the defendant's claim of right not to stand trial on the plaintiff's allegations," *Mitchell*, 472 U.S. at 527 (emphasis omitted). Every court of appeals that has addressed the conclusiveness requirement in connection with state-action immunity has agreed. *See South Carolina State Board of Dentistry* v. *FTC*, 455 F.3d 436, 441 (4th Cir. 2006); *Martin* v. *Memorial Hospital at Gulfport*, 86 F.3d 1391, 1396 (5th Cir. 1996); *Commuter Transportation Systems, Inc.* v. *Hillsborough County Aviation Authority*, 801 F.2d 1286, 1289-1290 (11th Cir. 1986).

2. In opposing certiorari, SolarCity nonetheless argued (Br. in Opp. 23) that the district court's denial of state-action immunity was not conclusive because the court "anticipated that the question would be raised again with a developed factual record" and invited the District to renew it "at summary judgment" (which of course the District did, reprising the same arguments it had made earlier). That argument fails because the collateral-order doctrine, as noted, requires courts to evaluate "the class of claims, taken as a whole." *Mohawk*, 558 U.S. at 107. For purposes of the conclusiveness requirement, that means examining not whether a particular judge expresses willingness to reconsider a particular order, but rather whether "a district court *ordinarily* would expect to reassess and revise" the type of order in question, *Gulfstream*, 485 U.S. at 277 (emphasis added). This standard makes sense, because the immediate appealability of a denial of state-action immunity should not turn on the fortuity of a certain district judge's views on whether he or she might revisit a prior order. That approach would be inconsistent with this Court's "express[] reject[ion]" of "efforts to reduce the finality requirement of § 1291 to a case-by-case determination of whether a particular ruling should be appealed." *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 439 (1985).

This Court's decision in *Swint* v. *Chambers County Commission*, 514 U.S. 35 (1995), is not to the contrary. The Court ruled in that case that the conclusiveness requirement was not satisfied by a district court's denial of summary judgment regarding whether a sheriff was a county policymaker for purposes of liability under 42 U.S.C. §1983. *See* 514 U.S. at 42. The basis for this Court's ruling was that "[t]he District Court planned to reconsider its ruling ... before the case went

to the jury." *Id.* But the county-policymaker issue—albeit "a legal question to be resolved by the trial judge before the case is submitted to the jury," *Jett* v. *Dallas Independent School District*, 491 U.S. 701, 737 (1989) (emphasis omitted)—turns in part on the facts, because it requires examining not only "state and local positive law," but also "custom or usage," *id.* That is why the district court in *Swint* had stated that "the Plaintiffs had come forward with *sufficient evidence* ... that Sheriff Morgan may be the final policy maker for the County." 514 U.S. at 39 (emphasis added). And it is why the court went on to state that, at trial, "[t]he parties will have an opportunity to convince [it] that Sheriff Morgan was or was not the final policy maker for the County," allowing the court to make "a ruling as a matter of law on that issue before the case goes to the jury." *Id.* at 39-40. Here, by contrast, further factual development could not affect the district court's clear-articulation ruling, because that ruling, as explained, resolved a purely legal question: whether Arizona law clearly articulated a policy that authorized the District's rate-setting. SolarCity itself apparently recognizes all this, as it never cited *Swint* below in arguing a lack of conclusiveness.

B. The Question Of State-Action Immunity Is Separate From The Merits Of An Antitrust Claim

1. Collateral orders are so named because they "resolve an important issue completely separate from the merits of the action." *Will*, 546 U.S. at 349. In other words, they address questions that are "conceptually distinct from the merits of the plaintiff's claim." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672 (2009). Orders denying state-action immunity on legal grounds meet that re-

quirement, whether based on the absence of clear articulation (as in this case) or on the absence as a matter of law of any required active supervision.[6]

a. Clear articulation. The clear-articulation inquiry focuses not on the merits of the plaintiff's claim, i.e., the alleged anticompetitive conduct, but on the legal authority "pursuant to" which the alleged conduct occurred. *Phoebe Putney*, 568 U.S. at 219. In particular, it focuses on whether that authority reflects "state policy to displace competition with regulation or monopoly public service." *Id.* at 225. The inquiry therefore involves identifying and interpreting the sources of state law that authorized the defendant's alleged conduct, and then determining (including in light of relevant case law) whether "displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated" by that law. *Id.* at 229; *see also id.* at 226-227. That inquiry is distinct from the underlying merits analysis, which addresses questions such as what conduct actually occurred, whether that conduct had an anticompetitive effect and, if so, whether there was a legitimate business justification for the conduct.

This Court's state-action-immunity cases confirm this separateness. In *Phoebe Putney* itself, for example, the Court did not address whether the defendant's

---

[6] In *Mohawk*, this Court noted that both the second and third *Cohen* conditions refer to the importance of the issue (explicitly in the case of the second condition and implicitly in the case of the third). *See* 558 U.S. at 107. Importance is addressed in the next subsection rather than this one, however, because *Mohawk* appeared to suggest that importance is "[m]ore significant[]" for the third condition. *Id.* In any event, the arguments in the next subsection regarding the importance of the issue in this case also apply to the second condition.

alleged conduct (hospital consolidation) was in fact anticompetitive; it instead analyzed various provisions of state law governing hospital districts. *See* 568 U.S. at 227 & n.6, 232-233. Similarly, in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Court discussed the state zoning laws "under which the [defendant] acted," and whether such laws foreseeably displaced competition; it did not evaluate whether the defendant's conduct (imposing billboard restrictions) was anticompetitive. *See id.* at 370-373 & n.3. And in *Town of Hallie*, the Court's clear-articulation analysis did not turn on determining the facts of the alleged conduct and its anticompetitive effects. Instead, the Court "examine[d] the [applicable] statutory structure in some detail." 471 U.S. at 41. Finally, in a case factually analogous to this one, the Court discerned clear articulation for ratemaking (by common carriers) solely by citing relevant state statutes. *See Southern Motor Carriers*, 471 U.S. at 63 & n.24.

Likewise here, the clear-articulation inquiry turns on identifying the Arizona statutory and regulatory provisions pursuant to which the District sets rates, and analyzing the results that foreseeably flow from those provisions. That inquiry is not "enmeshed in the factual and legal issues comprising the plaintiff's cause of action," *Coopers & Lybrand*, 437 U.S. at 469; *see California CNG, Inc.* v. *Southern California Gas Co.*, 96 F.3d 1193, 1196-1199 (9th Cir. 1996) (analyzing whether a California utility qualified for state-action immunity by parsing provisions of state law as well as decisions and guidelines of the California Public Utilities Commission).

This Court's decision in *Osborn* v. *Haley*, 549 U.S. 225 (2007), further illuminates the separateness of the

clear-articulation inquiry. *Osborn* addressed the immediate appealability of orders denying substitution of the United States for an individual government defendant pursuant to the Westfall Act. *See id.* at 238-239. More specifically, the orders turned on whether the defendant was "acting within the scope of his office or employment at the time of the incident out of which the claim arose." *Id.* at 230. *Osborn* held that this inquiry was "separate from the merits of the action." *Id.* at 238. The same is true here, because asking whether a defendant was acting within the scope of employment is akin to asking whether a defendant's alleged anti-competitive conduct was undertaken pursuant to (i.e., within the scope of) a clearly articulated state policy.

To be sure, identifying the legal authority relevant to the clear-articulation analysis requires some minimal "consideration of the factual allegations that make up the plaintiff's claim for relief," *Mitchell*, 472 U.S. at 528—enough to know what the defendant allegedly did, which is a necessary predicate to determining whether state law authorized the alleged conduct. But "the same is true ... when a court must consider whether a prosecution is barred by a claim of former jeopardy or whether a Congressman is absolutely immune from suit because the complained of conduct falls within the protections of the Speech and Debate Clause." *Id.* In those cases, too, a court must understand enough of the alleged facts to evaluate whether the defendant's double-jeopardy or speech-or-debate rights are implicated. But this Court has made clear that such overlap is not enough to defeat separateness, holding that "a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the plaintiff's factual al-

legations in resolving the immunity issue." *Id.* at 528-529.

The reason that degree of overlap is not enough, this Court expounded, is that a court adjudicating an assertion of immunity "need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim." *Mitchell*, 472 U.S. at 528. Rather, the court assumes for purposes of resolving the immunity question that the alleged conduct occurred (and, in the state-action-immunity context, that it was anticompetitive). The Ninth Circuit itself followed these precepts in an earlier state-action-immunity case, stating it would "assume without deciding that the Plaintiffs' allegations ... sufficiently allege an antitrust violation," and that it did not "need [to] consider the legality of the alleged conduct," but was "instead called to determine whether ... the [defendant's] alleged conduct qualifies for 'state action immunity.'" *Shames* v. *California Travel & Tourism Commission*, 626 F.3d 1079, 1082 (9th Cir. 2010).

b. Active supervision. As noted, state-action immunity can alternatively be denied based on the absence of required active supervision by the state. Although not applicable here, *see supra* n.1, the active-supervision requirement demands "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove of those that fail to accord with state policy." *North Carolina State Board of Dental Examiners* v. *FTC*, 135 S. Ct. 1101, 1112 (2015). A defendant may sometimes fail this test on factual grounds, such as where state officials did not exercise their power to supervise the defendant. But other denials are on legal grounds, namely where state law provides no means for state actors to super-

vise the defendant's alleged conduct in the first place. *See Patrick* v. *Burget*, 486 U.S. 94, 101-105 (1988); *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106 (1980).

Such denials (i.e., denials on legal grounds) satisfy the separateness requirement for essentially the same reasons given above regarding clear articulation. In such cases, the active-supervision inquiry entails analyzing state law and addressing not whether the antitrust laws were violated, but whether state law provides the requisite mechanisms for supervision by state officials. And again, in conducting that analysis, the court assumes that the alleged conduct occurred and was anticompetitive. The analysis thus has nothing to do with the merits of an antitrust claim.

c. Purpose. The purpose of the separateness requirement makes even clearer why denials of state-action immunity on legal grounds are separate from the merits of the underlying claims. The separateness requirement, this Court has explained, serves to ensure that "review now is less likely to force the appellate court to consider approximately the same (or a very similar) matter more than once." *Johnson*, 515 U.S. at 311 (emphasis omitted). Such duplicative review is "an unwise use of appellate courts' time." *Id.* at 317.

Allowing immediate appeal from orders denying state-action immunity to public entities on legal grounds poses very little risk of requiring appellate courts to consider the same issues twice. In a collateral-order appeal, the court considers whether state law authorized the defendant's challenged conduct or whether state law enabled state entities to actively supervise the defendant's alleged conduct (or both). If the court of appeals reverses the denial of immunity,

then the immunity disposes of the claim and there is no later appeal regarding it. If instead the court affirms, the second appeal arises from final judgment on the merits of the antitrust claims, and thus raises questions relating to the merits, such as what conduct the defendant engaged in and what its competitive effects were. Accordingly, there is little or no commonality between the two appeals.

2. In opposing certiorari, SolarCity disputed that the separateness requirement is met here by listing (Br. in Opp. 27-28) various questions that supposedly showed how state-action immunity denials are not separate from the merits. But SolarCity's examples related to *factual* determinations. *See id.* at 27 ("disputed facts"), 28 ("a necessarily factual showing"). Those examples are inapposite here, where the class of orders is those denying state-action immunity on legal grounds.

SolarCity's argument reflected the view it had presented in its Ninth Circuit brief (at 23 n.7), that the relevant class of orders is "*all* orders denying motions to dismiss on state-action grounds," not merely those denying state-action immunity to public entities on legal grounds. But that framing (which the government's Ninth Circuit amicus brief echoed (at 19-20)) is inconsistent with this Court's precedent. This Court has held in the qualified-immunity context that the relevant class of orders is orders rejecting the immunity on "a purely legal issue," *Ortiz*, 562 U.S. at 188—and that those orders are immediately appealable, whereas orders denying the immunity because of "factual issues genuinely in dispute" are not, *id.* Neither SolarCity nor

the government ever explained why the same distinction is not equally applicable in this context.[7]

3. Although the Ninth Circuit did not pass on separateness here, Pet. App. 11a n.4, the Fourth and Sixth Circuits have held that denials of state-action immunity are not separate from the merits. Their reasoning is unpersuasive.

As an initial matter, the Fourth Circuit introduced its separateness analysis with an incorrect statement of the law, asserting—without citing any authority—that the mere "*threat* of substantial duplication of judicial decision making" defeats separateness. *South Carolina State Board*, 455 F.3d at 441. But this Court has held that separateness is defeated only when the type of ruling in question "*generally* involves considerations that are 'enmeshed in the factual/legal issues comprising the cause of action.'" *Coopers & Lybrand*, 437 U.S. at 469

---

[7] SolarCity also asserted below and at the petition stage (*e.g.*, Br. in Opp. 6-9, 26-29) that even if denials of state-action immunity to public entities on lega lgrounds are immediately appealable, the separateness requirement is not met in this case because the District is a private entity. But that argument is outside the scope of the question presented, which is limited to "public entities." Pet. i. Indeed, the Court granted review on that question even though SolarCity also pointed to the District's purportedly private nature as a basis to deny certiorari (Br. in Opp. 17-18). In any event, as the District explained in its petition-stage reply brief (at 1-3), SolarCity's contention that the District is private contravenes not only the Arizona code, which declares the District to be a "public, political ... subdivision of the state," Ariz. Rev. Stat. §48-2302, but also the decision below, *see* Pet. App. 14-17a; Arizona precedent, *see, e.g.*, *City of Mesa* v. *Salt River Project Agricultural Improvement & Power District*, 373 P.2d 722, 726 (Ariz. 1962); the state constitution, *see supra* pp.5-6; and this Court's decision in *Ball*, *see, e.g.*, 451 U.S. at 355 ("The *public entity* at issue here is the Salt River Project Agricultural Improvement and Power District[.]" (emphasis added)).

(emphasis added) (quoting *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963)). Hence, this Court held in *Van Cauwenberghe* v. *Biard* that the separateness requirement was unsatisfied by orders denying dismissal on *forum non conveniens* grounds because "*in the main*, the issues that arise in *forum non conveniens* determinations will substantially overlap factual and legal issues of the underlying dispute." 486 U.S. at 529 (emphasis added). Contrary to the Fourth Circuit's statement, then, a mere "threat" of overlap with the underlying merits is insufficient; a given type of order is sufficiently separate unless in fact it generally overlaps with the merits.

The balance of the Fourth Circuit's separateness discussion, which attempted to explain why denials of state-action immunity overlap with the merits, was conclusory. For example, the court stated that "look[ing] to state law and determin[ing] if the state has a clearly articulated policy to displace competition ... is inherently 'enmeshed' with the underlying cause of action, which requires a determination of whether a defendant has used 'unfair methods of competition ...' or 'unfair or deceptive acts or practices.'" *South Carolina State Board*, 455 F.3d at 442-443. To the extent the court was saying that whether a given entity was authorized to act anticompetitively overlaps with whether it actually acted anticompetitively, that degree of overlap is not, as discussed, sufficient under this Court's case law to defeat separateness. *See supra* pp.21-22. The court did not explain its contrary conclusion.

The Fourth Circuit's separateness discussion also quoted from *Huron Vailey Hospital, Inc.* v. *City of Pontiac*, 792 F.2d 563 (6th Cir. 1986), but that case's discussion was similarly conclusory. The Sixth Circuit

stated that "[t]he analysis necessary to determine whether clearly articulated or affirmatively expressed state policy is involved and whether the state actively supervises the anticompetitive conduct overlaps the analysis necessary to determine whether the defendants have violated the rights of" the plaintiff. *Id.* at 567. Like the Fourth Circuit, however, the Sixth Circuit did not engage with the arguments above for why, under this Court's precedent, the separateness requirement *is* met here. Nor did it explain either the statement just quoted or its further statement that determinations "that affirmatively expressed state policy is involved and that the state actively supervises the anticompetitive conduct ... are intimately intertwined with the ultimate determination that anticompetitive conduct has occurred." *Id.*

C. Orders Denying State-Action Immunity To Public Entities Are Effectively Unreviewable After Final Judgment

The third collateral-order requirement is that orders in the relevant class be effectively unreviewable on appeal from a final judgment. The court of appeals held here that denials of state-action immunity to public entities do not satisfy that condition. Pet. App. 7a-11a. Its rationale was that state-action immunity is an "immunity from liability" rather than an "immunity from suit." Pet. App. 8a-9a. But while some of this Court's early collateral-order cases employed that dichotomy, more recent decisions make clear that those labels are not the "decisive consideration." *Mohawk*, 558 U.S. at 107. Instead, the decisive consideration is "whether delaying review until the entry of final judgment would imperil a substantial public interest or some particular value of a high order." *Id.* (quotation

marks omitted). Denials of state-action immunity meet that standard; indeed, they implicate the same public interests and values that the Court has held sufficient to justify immediate appeals from orders denying Eleventh Amendment immunity and qualified immunity.

1. An order is effectively unreviewable if delaying an appeal would imperil a sufficiently important interest

In the first several decades after *Cohen*, this Court held that various orders were immediately appealable because they could not be reviewed effectively after final judgment. For example, the Court allowed immediate appeals from orders refusing to require the posting of a security bond, in *Cohen*; denying motions to reduce bail, in *Stack* v. *Boyle*, 342 U.S. 1 (1951); denying motions to dismiss an indictment either on double-jeopardy grounds, in *Abney* v. *United States*, 431 U.S. 651 (1977), or under the Speech or Debate Clause, in *Helstoski* v. *Meanor*, 442 U.S. 500 (1979); and rejecting claims of qualified immunity, in *Mitchell*, or absolute immunity, in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982).

In many of these early collateral-order decisions, the Court drew the same line that the Ninth Circuit embraced here, between "entitlement[s] not to stand trial," which cannot be effectively vindicated on appeal from a final judgment, and defenses against liability, which can. *Mitchell*, 472 U.S. at 525. But the Court eventually acknowledged that it is "difficult" to identify "whether 'the essence' of [a] claimed right is a right not to stand trial" or a right to avoid liability, "because in some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial." *Van Cauwenberghe*, 486 U.S. at 524.

Justice Scalia's concurring opinion in *Lauro Lines s.r.l.* v. *Chasser*, 490 U.S. 495 (1989), marked a turning point in the Court's articulation of the collateral-order doctrine. The district court in that case had denied a motion to dismiss under a contract's forum-selection clause that identified Naples, Italy, as the venue for any action arising under the contract. *See id.* at 496-497. This Court unanimously held that that denial was not immediately appealable, *see id.* at 500-501, but Justice Scalia wrote separately "to make express what seem[ed] ... implicit in [the Court's] analysis," *id.* at 502 (concurring opinion). There was no doubt, he wrote, "that the 'right not to be sued elsewhere than in Naples' is not fully vindicated—indeed, to be utterly frank, is positively destroyed—by permitting the trial to occur" in a different venue and then "reversing its outcome" on appeal from a final judgment. *Id.* at 502-503. But that was "vindication enough" to bar review under the collateral-order doctrine, Justice Scalia explained, because "the law does not deem the right *important enough* to be vindicated by, as it were, an injunction against its violation obtained through interlocutory appeal." *Id.* at 503.

In subsequent cases, this Court essentially adopted Justice Scalia's concurrence as the touchstone for the effective-unreviewability analysis. In *Digital Equipment*, for example, the Court explained—citing that concurrence—that the question "whether a right is 'adequately vindicable' or 'effectively reviewable'" on appeal from a final judgment "cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." 511 U.S. at 878-879. And an interest "qualifies as 'important' in *Cohen*'s sense," the Court elaborated, when it is "weightier than the socie-

tal interests advanced by the ordinary operation of final judgment principles." *Id.* at 879. Similarly, the Court observed in *Will* v. *Hallock* that "it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." 546 U.S. at 353; *see also id.* at 352 (citing Justice Scalia's *Lauro Lines* concurrence). And in *Mohawk*, the Court stated that the "decisive consideration" for effective-unreviewability purposes is whether a sufficiently important interest would be threatened absent immediate appeal. 558 U.S. at 107.

In sum, this Court's recent collateral-order cases establish that the key factor in determining effective unreviewability is the importance of the interests at stake. Hence, the notion of a right not to stand trial—or of "immunity from suit"—is a label that is applied to signify the conclusion that the class of orders at issue is important enough to warrant immediate appeal, not a factor in reaching that conclusion in the first place.[8]

---

[8] It is a different matter, of course, when there is "an explicit statutory or constitutional guarantee that trial will not occur—as in the Double Jeopardy Clause ... or the Speech or Debate Clause." *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 801 (1989) (citation omitted). In that circumstance, i.e., where an express immunity from suit is conferred, immediate appeal is the only way to protect that immunity when its assertion is rejected, and thus "there is little room for the judiciary to gainsay its 'importance.'" *Digital Equipment*, 511 U.S. at 879.

2. State-action immunity implicates important public interests that this Court has held sufficient to justify interlocutory appeal

In *Will*, this Court summarized the kinds of interests it has held important enough that they are not adequately vindicated through appeal from final judgment: "honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual." 546 U.S. at 352-353. The Court explained that in *Nixon*, for example, it had "stressed the 'compelling public ends,' 'rooted in ... the separation of powers,' that would be compromised by failing to allow immediate appeal of a denial of absolute Presidential immunity." *Id.* at 352 (omission in original) (quoting *Nixon*, 457 U.S. at 749, 758). Similarly, *Will* recounted that in *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), the Court had "explained the immediate appealability of an order denying a claim of Eleventh Amendment immunity by adverting not only to the burdens of litigation but to the need to ensure vindication of a State's dignitary interests." *Will*, 546 U.S. at 352. And in *Mitchell*—allowing immediate appeal from the denial of a qualified-immunity claim—the Court "spoke of the threatened disruption of governmental functions, and fear of inhibiting able people from exercising discretion in public service if a full trial were threatened whenever they acted reasonably in the face of law that is not 'clearly established.'" *Will*, 546 U.S. at 352 (quoting *Mitchell*, 472 U.S. at 526).

State-action immunity implicates two of these "substantial public interest[s]" or "value[s] of a high order," *Mohawk*, 558 U.S. at 107. First, like Eleventh

Amendment immunity, state-action immunity protects and respects states' dignitary interests as sovereigns, including (with federal antitrust claims) by maintaining the proper boundaries between states and the federal government. Second, like qualified immunity, state-action immunity preserves both the efficiency and the initiative of state and local officials, protecting against the disruption of governmental functions and ensuring that public servants exercise their delegated discretion to regulate without fear of being subjected to potentially chilling litigation. As with Eleventh Amendment immunity and qualified immunity, these interests are irredeemably compromised by requiring a public entity to litigate to final judgment before having the opportunity to appeal an erroneous rejection of state-action immunity.

a. State sovereignty and federalism. Since its inception in *Parker*, the doctrine of state-action immunity has been animated by principles of federalism and respect for state sovereignty. *Parker* involved a raisin-marketing program adopted by California, a program the Court assumed "would violate the Sherman Act if" adopted by private entities. 317 U.S. at 350. But the Court—rejecting the United States' contrary submission—found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-351; *compare* U.S. Amicus Br. 59-66, *Parker*, No. 46 (Oct. 1942). The Court observed that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Con-

gress." 317 U.S. at 351. Because California had adopted the raisin program "as an act of government," i.e., in its capacity "as sovereign," the Court held that "the Sherman Act did not undertake to prohibit" its conduct. *Id.* at 352.

Since *Parker*, this Court has returned time and again to the principle that state-action immunity rests on federalism and respect for state sovereignty. For example, in *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982), the Court explained that state-action immunity "reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution," *id.* at 53. Similarly, in its most recent decision on state-action immunity, the Court observed that "[w]hile the States regulate their economies in many ways not inconsistent with the antitrust laws, in some spheres they impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition *to achieve public objectives*." *North Carolina State Board*, 135 S. Ct. at 1109 (emphasis added) (quotation marks omitted). State-action immunity, the Court explained, protects "the States' power to regulate" in this way; if instead "every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate." *Id.* (citing *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 133 (1978)). Several of the Court's earlier state-action-immunity decisions are to the same effect. *See FTC* v. *Ticor Title Insurance Co.*, 504 U.S. 621, 633 (1992) (*Parker* "was grounded in principles of federalism"); *City of Colum-*

bia, 499 U.S. at 372 (similar); *Patrick*, 486 U.S. at 99 (*Parker* rested on "principles of federalism and state sovereignty"); *Town of Hallie*, 471 U.S. at 38 (similar).

The federalism and sovereignty interests underlying state-action immunity apply not only when the defendant is a state but also when (as here) it is a substate governmental entity carrying out a state's economic policies. As a plurality explained in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), state-action immunity in such cases "preserves to the States their freedom under our dual system of federalism to *use their municipalities* to administer state regulatory policies free of the inhibitions of the federal antitrust laws," *id.* at 415 (op. of Brennan, J.) (emphasis added). The Court unanimously reaffirmed that rationale in *Phoebe Putney*. 568 U.S. at 225-226. Applying state-action immunity to entities like the District, therefore, protects each state's ability to decide how to structure its economic policymaking—including whether to implement particular policies itself or, as in this case, to enlist its political subdivisions to carry out its policies "to achieve public objectives." *North Carolina State Board*, 135 S. Ct. at 1109. Absent the immunity, political subdivisions could be subjected to years of antitrust litigation for helping states exercise their fundamental sovereign prerogative to regulate their economies within their borders. Allowing the imposition of such burdens based on the means by which a state chooses to implement its policies substantially infringes the state's dignity and autonomy.[9]

---

[9] In fact, absent state-action immunity, states that chose to regulate directly could themselves be sued for purported anticompetitive conduct—and could not invoke Eleventh Amendment immunity if, for example, the claim were brought by the United

This Court has recognized that such infringements warrant immediate appellate review. In *Puerto Rico Aqueduct*, the Court held that orders denying Eleventh Amendment immunity are immediately appealable because of "the importance of ensuring that the States' dignitary interests can be fully vindicated." 506 U.S. at 146. Denying public entities—including states themselves, *see supra* n.9—the ability to obtain immediate review of orders rejecting state-action immunity would threaten those same federalism and sovereignty interests.

b. Government efficiency and effectiveness. State-action immunity also protects a second interest that this Court has held independently sufficient to justify immediate appeals: the need to ensure that government policymakers exercise their discretion efficiently and freely, i.e., with the objective of advancing the public interest rather than of avoiding litigation.

In permitting immediate appeals from orders denying qualified immunity, the Court in *Mitchell* "spoke of the threatened disruption of governmental functions, and fear of inhibiting able people from exercising discretion in public service if a full trial were threatened whenever they acted reasonably in the face of law that is not 'clearly established.'" *Will*, 546 U.S. at 352 (quoting *Mitchell*, 472 U.S. at 526). "The conception animating the qualified immunity doctrine," *Mitchell* explained, "is that 'where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken *with independence and without fear of*

States, *see United States* v. *Mississippi*, 380 U.S. 128, 140-141 (1965), or brought against a state official for prospective equitable relief, *see Seminole Tribe* v. *Florida*, 517 U.S. 44, 71 n.14 (1996).

consequences'" arising from legal action. 472 U.S. at 525 (emphasis added) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982)). Exposing policymakers to "the risks of trial" can undermine effective government operations in numerous ways, including "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.* at 526. Indeed, the Court observed, "even such pretrial matters as discovery ... can be peculiarly disruptive of effective government." *Id.* (quotation marks omitted).[10]

This Court reiterated these points more recently, remarking that:

> If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.

Iqbal, 556 U.S. at 685. This potential for interference with proper government operations, the Court has repeatedly concluded, is too serious for the erroneous de-

---

[10] This case is illustrative: In addition to deposing several of the District Board's members, SolarCity subpoenaed 46 citizens who had been elected to serve on the Board or Council, with the objective of (in its words) "gain[ing] discovery into the members' financial interests." Dist. Ct. Dkt. 43, at 9 & n.4.

nial of qualified immunity to be remedied only after final judgment. *See id.* at 671; *Will*, 546 U.S. at 352.

Immediate appeals from denials of state-action immunity to public entities are justified for much the same reason as are immediate appeals from denials of qualified immunity: to ensure that policymakers in state and local government freely exercise their discretion, without the distraction and disruption inflicted by litigation over the merits of their policies, and without the inhibition caused by fear of such litigation. Unless they can obtain prompt appellate review of a denial of state-action immunity, government actors risk serious burdens whenever they make a decision that displeases even a small segment of the public—burdens that include the need to collect and produce documents, to prepare and appear for depositions and trial, and to suffer the prolonged strain and disruption that litigation creates, as well as the potential for unwarranted condemnation of the way they made difficult policy judgments and resolved legitimate competing interests. This risk can chill government policymaking, impelling officials toward decisions that minimize the prospect of their being sued rather than decisions that best advance the public interest.

This risk is especially serious given the unusually onerous nature of antitrust litigation. Such litigation often "involve[s] voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money." *Manual for Complex Litigation, Fourth*, §30, at 519 (2004); *see also Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 558 (2007) ("proceeding to antitrust discovery can be expensive"); Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Dis-*

covery Abuse in Private Antitrust Litigation, 78 N.Y.U. L. Rev. 1887, 1898-1899 (2003) ("[C]ourts typically permit antitrust discovery to range further (and costs to run higher) than in most other cases."). In this case, for example, although the district court stayed proceedings after this Court granted certiorari (Dist. Ct. Dkt. 334), the District has already been forced to complete fact discovery (including thirty-nine depositions), expert discovery (involving ten experts), and summary-judgment briefing, all because a disgruntled entity disagrees with the way the District's Board exercised the ratemaking authority delegated to it by Arizona. And beyond the discovery stage, trials in antitrust cases "usually are long, and there often are controversies over settlements and attorney fees." *Manual for Complex Litigation, Fourth*, §30, at 519. As a result, when a district court errs in denying a claim of state-action immunity, a defendant entitled to that immunity will be forced to endure, unnecessarily, significant and protracted burdens unless it can appeal immediately.

The Eleventh Circuit recognized these points in allowing immediate appeals from orders denying state-action immunity; the court stated that "[a]bsent state immunity local officials will avoid decisions involving antitrust laws which would expose such officials to costly litigation and conclusory allegations." *Commuter Transportation*, 801 F.2d at 1289. The leading antitrust treatise similarly observes that it is harmful for public entities to "be intimidated from carrying out their regulatory obligations by threats of costly litigation, even if they might ultimately win." Areeda & Hovenkamp, *Fundamentals of Antitrust Law* §2.04[B], at 2-52 (4th ed. & 2015 Supp.).

All this is particularly true in the context of public utilities like the District. As two organizations representing public power utilities explained in their petition-stage amicus brief (at 13-16), such utilities often lack sufficient resources to undertake complex and protracted litigation. Thus, antitrust litigation "will necessarily draw resources away from the public services these entities provide." *Id.* at 13. The costs of such litigation, moreover, "will ultimately be shouldered by" the state's citizens. *Id.* at 16. In the case of public power utilities, that means higher electricity rates, "reduced services, or both." *Id.*; *see also supra* n.10.

3. Lower courts' reasons for rejecting effective unreviewability in this context are unpersuasive

The Ninth Circuit's rationales for holding that orders denying state-action immunity to public entities do not satisfy the effective-unreviewability requirement are unavailing, as are the similar rationales previously advanced by the Fourth and Sixth Circuits.

First, the Ninth Circuit relied (as the Sixth Circuit had) on the fact that this Court "has cautioned against broad assertions of immunity from suit and has instructed [lower courts] to 'view claims of a right not to be tried with skepticism, if not a jaundiced eye.'" Pet. App. 8a; *accord Huron Valley*, 792 F.2d at 568. But while this Court has reserved collateral-order appeal for circumstances where "delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order,'" *Mohawk*, 558 U.S. at 107, it has not hesitated—even in its recent collateral-order decisions—to allow immediate appeal where those circumstances exist. *See Osborn*, 549 U.S. at 237-239 (orders rejecting certification

and substitution under the Westfall Act); *Sell* v. *United States*, 539 U.S. 166, 175-177 (2003) (orders authorizing forced medication of a mentally ill criminal defendant). Simply reciting that such circumstances must be present does nothing to resolve whether they are present here.[11]

Second, the Ninth Circuit relied (as the Fourth Circuit had) on the fact that this Court articulated the state-action-immunity doctrine as a matter of statutory rather than constitutional law. In the Ninth Circuit's words, this Court "assumed in *Parker* that Congress could have blocked the challenged California price regulation" had it wished to do so. Pet. App. 9a; *see also South Carolina State Board*, 455 F.3d at 444. This Court, however, has never limited collateral-order review to constitutional matters. To the contrary, it has repeatedly authorized immediate appeal from orders resolving statutory and common-law issues. *See Osborn*, 549 U.S. at 237-239 (Westfall Act); *Quackenbush* v. *Allstate Insurance Co.*, 517 U.S. 706, 711-715 (1996) (abstention-based stay and remand orders); *Mitchell*, 472 U.S. at 525-526 (qualified immunity). And even if the collateral-order doctrine were limited to orders implicating constitutional issues, that limitation would be satisfied here because this Court has consistently recognized that the foundational constitutional principles of state sovereignty and federalism animate the doctrine of state-action immunity. *See supra* pp.32-35.

---

[11] The Sixth Circuit relatedly rested its refusal to permit immediate appeal in this context largely on the fact that this Court had not allowed it. *See Huron Valley*, 792 F.2d at 568. But that same reasoning—which finds no support in this Court's precedent—would have led the court at the time to improperly reject immediate appeal for denials of Eleventh Amendment immunity, which this Court allowed only later (in *Puerto Rico Aqueduct*).

Third, the Ninth Circuit reasoned (somewhat inconsistently with the rationale just discussed) that the "constitutional origins" of state-action immunity are by themselves insufficient to justify collateral-order appeal. Pet. App. 11a. But the District has never argued otherwise. *See* Pet. 26-27; Pet'r C.A. Reply Br. 27 ("[T]he District has never argued ... that any constitutional ruling is immediately appealable."). Just as some non-constitutional issues may implicate the kinds of important interests that warrant immediate appeal, some constitutional issues may not. *See, e.g.*, Pet. App. 10a (discussing the *Noerr-Pennington* doctrine of antitrust law, which several courts of appeals have held not to be a basis for immediate appeal, despite its constitutional nature).

Fourth, the Ninth Circuit relied—as the Fourth and Sixth Circuits had—on the notion that state-action immunity is a defense to liability rather than an immunity from suit. Pet. App. 8a-9a; *see also South Carolina State Board*, 455 F.3d at 444-445; *Huron Valley*, 792 F.2d at 567. But as explained, this Court's recent collateral-order cases recognize that that distinction is elusive and analytically unhelpful. *See supra* pp.28-30. That is why the Court has in recent cases prescribed a functional rather than semantic standard for identifying the issues that are effectively unreviewable after final judgment: whether denying immediate appeal would imperil a sufficiently important interest.

Fifth, the Ninth Circuit reasoned that the District may not appeal the denial of state-action immunity because of "the possibility of mere distraction or inconvenience" occasioned by litigation. Pet. App. 12a-13a. But again, that is not what the District has argued. It has instead argued that, for the reasons discussed, state-action immunity protects interests that go well

beyond "the possibility of mere distraction or inconvenience." The burden of defending against antitrust challenges to state economic policies threatens to impair states' ability to adopt and implement economic policies in their citizens' interest. State-action immunity protects against that threat. It also protects states' sovereign prerogative to decide how to regulate their economies within their borders; it prevents the dignitary harm that states suffer when their political subdivisions (or possibly the states themselves) are haled into federal court over their economic policies; and it preserves the boundary between federal and state regulation.

The foregoing shows why the Ninth Circuit's reliance on *Will* was misplaced. The only interest implicated by the order at issue there (refusing to apply the judgment bar of the Federal Tort Claims Act) was "the avoidance of litigation for its own sake," "not the preservation of initiative." 546 U.S. at 353. Accordingly, this Court concluded that "[t]he judgment bar at issue ... has no claim to greater importance than the typical defense of claim preclusion." *Id.* at 355. The same cannot fairly be said of state-action immunity.

Finally, the Ninth Circuit invoked the Fourth Circuit's observation that there are certain "incongruities between the state-action doctrine and immunities ... that [this] Court has held fall within the collateral-order doctrine." Pet. App. 14a; *see also South Carolina State Board*, 455 F.3d at 446-447. For example, whereas "municipalities may invoke state-action immunity, ... they may not rely on qualified or Eleventh Amendment immunity." Pet. App. 15a. Likewise, whereas "the state-action doctrine bars 'all antitrust actions, regardless of the relief sought,' ... qualified and sovereign immunities do not prevent suits for certain prospective

relief." *Id.* And whereas "a state cannot rely on sovereign immunity to defend against" most claims brought by the United States, it can "invoke state-action immunity even in a lawsuit by the United States" for alleged antitrust violations. *Id.* Neither the Fourth Circuit nor the Ninth Circuit explained, however, why these distinctions matter in determining whether denials of state-action immunity are subject to immediate appeal. They do not matter. None of them bears on any part of this Court's collateral-order standard, including the question whether state-action immunity, like sovereign and qualified immunity, implicates important public interests that cannot be adequately vindicated by appeal after final judgment. The denial of state-action immunity does implicate such interests, and it is therefore effectively unreviewable on appeal from a final judgment.

D. The Additional Arguments That SolarCity And The Government Offered Below Fail

In the court of appeals, SolarCity and the United States advanced several arguments in addition to those addressed above. Each lacks merit.

First, SolarCity suggested (C.A. Br. 18) that collateral-order review is unavailable here because state-action immunity is an affirmative defense. But both Eleventh Amendment immunity and qualified immunity are also affirmative defenses. *See Raygor* v. *Regents of the University of Minnesota*, 534 U.S. 533, 537 (2002) (answer set forth "eight affirmative defenses, including ... Eleventh Amendment immunity"); *Crawford-El* v. *Britton*, 523 U.S. 574, 587 (1998) ("[Q]ualified immunity is an affirmative defense."). Yet immediate appeal is available from a denial of either of those immunities.

Second, SolarCity cited (C.A. Br. 26) cases in which denials of state-action immunity were reviewed after final judgment, asserting that "[a]ppellate review was effective in each of those cases ..., without collateral order review." *Accord* U.S. C.A. Br. 16. That assertion, however, assumes the conclusion, i.e., that review after final judgment was "effective" in the *Cohen* sense. If SolarCity's argument were valid, one could just as easily say that because a claim of Eleventh Amendment immunity, qualified immunity, or double jeopardy could in theory be reviewed after final judgment, such review is "effective," and thus collateral-order review is not available on those issues. That is not the law.

Third, the government relatedly argued (C.A. Br. 17) that collateral-order review of denials of state-action immunity is unnecessary because erroneous denials can be remedied via mandamus or an appeal certified under 28 U.S.C. §1292(b). But again, the same could be said of erroneous denials of Eleventh Amendment immunity, qualified immunity, or rulings on any other issue that this Court has held satisfies the collateral-order doctrine. The government's argument thus does nothing to support the claim that denials of state-action immunity are not immediately appealable.

Fourth, the government cited (C.A. Br. 11) 28 U.S.C. §1292(e), which authorizes this Court to promulgate rules allowing collateral-order review of particular types of orders. The Court, however, has not treated that statute as foreclosing courts from recognizing categories of collateral-order review via adjudication. For example, *Osborn* and *Sell*, each of which approved collateral-order review, postdated the enactment of section 1292(e). And even recent cases that denied collateral-order review, such as *Mohawk*, did not rest solely or even primarily on that provision. The

Court has thus recognized that section 1292(e) supplements, rather than replaces, courts' power to permit collateral-order appeals via adjudication. That recognition is consistent with the statutory text. Although section 1292(e) authorizes this Court to use rulemaking, it does not provide that appellate courts lack jurisdiction over any collateral-order appeal unless such appeal has been approved by rulemaking (or by judicial precedent that predates Congress's conferral of rulemaking authority).[12]

Fifth, the government denied that state-action immunity has any basis in Eleventh Amendment immunity, asserting (C.A. Br. 23-24) that state-action immunity "is concerned not with the dignity interests of the states" but with "permitting states to engage in economic regulation." But those two are the same; a central way in which states realize their autonomy and dignity as sovereigns is by engaging in economic regulation. Likewise infirm was the government's related attempt (*id.* at 25-26) to distinguish between state *sovereignty* and state sovereign *immunity* (i.e., Eleventh Amendment immunity). The entire basis for state sovereign immunity is, as the name suggests, states' status as sovereigns. Indeed, this Court has explained that "immunity from private suits [is] central to sovereign

---

[12] The government's arguments on this point rang particularly hollow given that they constituted an unexplained (indeed, unacknowledged) reversal from cases in which the government (after the adoption of section 1292(e)) urged a broadening of the collateral-order doctrine so as to advance its own interests. In *Mohawk*, for example, the United States—though opposing collateral-order appeal of orders requiring a *private party* to disclose information covered by the attorney-client privilege—"contend[ed] that collateral order appeals should be available for rulings involving certain *governmental* privileges." 558 U.S. at 113 n.4 (emphasis added).

dignity," and that "fear of private suits against nonconsenting States was the central reason" for "preserv[ing] the States' sovereign immunity" in the Eleventh Amendment. *Alden* v. *Maine*, 527 U.S. 706, 715, 756 (1999). Moreover, there is no question that *Parker* held states immune for any violations of federal antitrust law they commit *as sovereigns*. 317 U.S. at 352. It is untenable to say that this holding, the essence of which was conferring an immunity, involved state sovereignty but not sovereign immunity.

Finally, both SolarCity and the government cited this Court's description of state-action immunity as "disfavored." *North Carolina State Board*, 135 S. Ct. at 1110, *quoted in* Resp. C.A. Br. 17 *and* U.S. C.A. Br. 26; *accord* Br. in Opp. 3, 5, 30. As the Court's cases make clear, however (and as SolarCity's own brief recognized), that term simply explains why the Court requires clear articulation and (when applicable) active supervision in order for the immunity to apply. In *Phoebe Putney*, for example, the Court immediately followed its "disfavored" remark by saying: "Consistent with this preference, we recognize state-action immunity only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that 'is the State's own.'" 568 U.S. at 225 (quoting *Ticor*, 504 U.S. at 635). And it then immediately detailed the requirements for state-action immunity, in terms consistent with the description of the requirements above. *See id.* Even if state-action immunity is "disfavored" in the sense that those requirements are not often met, that does not affect its importance when they *are* met, and hence does not affect the need for immediate appeal of orders denying it.

In short, nothing SolarCity or the government has argued in this case undercuts the basic point that state-

action immunity rests on the same principles that this Court has deemed important enough to warrant immediate appeal. Because orders denying the immunity to public entities on legal grounds are also conclusive and separate from the underlying merits, the collateral-order doctrine's requirements are satisfied.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHRISTOPHER E. BABBITT
DANIEL S. VOLCHOK
DAVID M. LEHN
DAVID GRINGER
DANIEL WINIK
ARPIT K. GARG
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

MOLLY S. BOAST
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007
(212) 230-8800
molly.boast@wilmerhale.com

CHRISTOPHER T. CASAMASSIMA
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 S. Grand Ave.
Los Angeles, CA 90071
(213) 443-5300

JANUARY 2018

No. 17-368

In The Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, PETITIONER,

v.

TESLA ENERGY OPERATIONS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

RICHARD A. FEINSTEIN
BOIES, SCHILLER & FLEXNER LLP
1401 New York Ave., N.W.
Washington, D.C. 20005

STEVEN C. HOLTZMAN
KATHLEEN R. HARTNETT
SEAN P. RODRIGUEZ
BOIES, SCHILLER & FLEXNER LLP
1999 Harrison St.
Oakland, CA 94612

DEANNE E. MAYNARD
Counsel of Record
JOSEPH R. PALMORE
JEFFREY A. JAECKEL
SOPHIA M. BRILL
SETH W. LLOYD
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-8740
DMaynard@mofo.com

JAMES R. SIGEL
MORRISON & FOERSTER LLP
425 Market St.
San Francisco, CA 94105

Counsel for Respondent Tesla Energy Operations, Inc.

FEBRUARY 12, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

In January 2018, SolarCity Corporation was renamed Tesla Energy Operations, Inc. Like SolarCity, Tesla Energy Operations, Inc. is wholly owned by Tesla, Inc., a publicly traded company.

TABLE OF CONTENTS

Page

RULE 29.6 CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 4

A. SolarCity 4

B. SRP 5

C. SRP's Anticompetitive Conduct 7

D. District Court Proceedings 8

E. Ninth Circuit Proceedings 10

SUMMARY OF ARGUMENT 12

ARGUMENT 17

I. AN INTERLOCUTORY DENIAL OF A *PARKER* STATE-ACTION DEFENSE CAN BE EFFECTIVELY REVIEWED ON APPEAL FROM FINAL JUDGMENT 17

A. Because *Parker* Establishes An Exemption From The Antitrust Laws' Substantive Prohibitions, Orders Denying The Defense Are Not Effectively Unreviewable 18

B. The "Important" Interests SRP Invokes Cannot Justify Interlocutory Appeal 24

1. Importance is an additional, not a substitute, requirement 24

TABLE OF CONTENTS—Continued

Page

2. The interests SRP cites are insufficient 29

II. THE *PARKER* STATE-ACTION DEFENSE IS NOT COMPLETELY SEPARATE FROM THE MERITS OF AN ANTITRUST ACTION 39

A. The *Parker* Inquiry Overlaps With The Merits 39

B. SRP Cannot Satisfy The "Completely Separate" Requirement By Creating A Subcategory Of "Legal" *Parker* Claims 45

III. INTERLOCUTORY ORDERS DENYING A *PARKER* STATE-ACTION DEFENSE ARE NOT CONCLUSIVE 53

A. The General Class Of Orders Denying *Parker* Defenses Is Not Conclusive 53

B. The District Court's Order Here Did Not Conclusively Resolve The *Parker* Issue 56

IV. THE COLLATERAL-ORDER DOCTRINE SHOULD NOT BE EXPANDED 59

CONCLUSION 62

TABLE OF AUTHORITIES

Page

CASES

324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) 34

Abney v. United States, 431 U.S. 651 (1977) 19

Alden v. Maine, 527 U.S. 706 (1999) 30

Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492 (1988) 44

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 38, 46, 52

Ball v. James, 451 U.S. 355 (1981) 5, 6, 32

Behrens v. Pelletier, 516 U.S. 299 (1996) 30

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 38

City of Mesa v. Salt River Project Agric. Improvement & Power Dist., 373 P.2d 722 (Ariz. 1962) 5, 32

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 10, 27, 28, 37, 39, 40, 56, 57

Commuter Transp. Sys., Inc. v. Hillsborough Cty., 801 F.2d 1286 (11th Cir. 1986) 25, 56

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 39, 41, 42, 49, 51, 52

Cunningham v. Hamilton Cty., 527 U.S. 198 (1999) 42, 51

Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994) 1, 17, 19, 20, 24, 26, 27, 28, 57

Edelman v. Jordan, 415 U.S. 651 (1974) 30

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) 39

TABLE OF AUTHORITIES—Continued

Page

Freedom Holdings, Inc. v. Cuomo, 592 F. Supp. 2d 684 (S.D.N.Y. 2009) 55

Freedom Holdings, Inc. v. Cuomo, 624 F.3d 38 (2d Cir. 2010) 55

Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205 (2d Cir. 2004) 54

FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) 45

FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216 (2013) 21, 37, 43, 44, 53, 54

FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992) 9, 21, 45, 48, 50, 53

Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) 53, 54

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 30, 37

Hemi Grp., LLC v. City of New York, 559 U.S. 1 (2010) 4

Hertz Corp. v. Friend, 559 U.S. 77 (2010) 51

Jinks v. Richland County, S.C., 538 U.S. 456 (2003) 31

Johnson v. Jones, 515 U.S. 304 (1995) 39, 41, 42, 45, 48, 51

Kay Elec. Co-op v. City of Newkirk, Okla., 647 F.3d 1039 (10th Cir. 2011) 44

Lauro Lines s.r.l. v. Chasser, 490 U.S. 495 (1989) 19, 26, 27

TABLE OF AUTHORITIES—Continued

Page

Local 266, I.B.E.W. v. Salt River Project Agric. Improvement & Power Dist., 275 P.2d 393 (Ariz. 1954) 5, 6, 47

Martin v. Mem'l Hosp. at Gulfport, 86 F.3d 1391 (5th Cir. 1996) 25, 55

Microsoft Corp. v. Baker, 137 S. Ct. 1702 (2017) 1, 17, 61

Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989) 20, 25

Mitchell v. Forsyth, 472 U.S. 511 (1985) 19, 22, 23, 24, 40, 41, 55

Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009) 1, 2, 17, 28, 29, 33, 51, 57, 58, 59, 60, 61

Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) 31

North Carolina State Bd. of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015) 33, 43, 45, 47, 49, 50, 54

Osborn v. Haley, 549 U.S. 225 (2007) 25, 26, 53

Owen v. City of Independence, 445 U.S. 622 (1980) 30, 31, 34

Parker v. Brown, 317 U.S. 341 (1943) 1, 20, 22, 40

Patrick v. Burget, 486 U.S. 94 (1988) 22, 23

Plumhoff v. Rickard, 134 S. Ct. 2012 (2014) 26, 52

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 19, 22, 23, 30, 36, 48

Reynolds v. Sims, 377 U.S. 533 (1964) 31

Richardson v. McKnight, 521 U.S. 399 (1997) 40

TABLE OF AUTHORITIES—Continued

Page

S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) 21, 23, 41

Segni v. Commercial Office of Spain, 816 F.2d 344 (7th Cir. 1987) 21

Sell v. United States, 539 U.S. 166 (2003) 18, 40

Shaw v. Delta Airlines, 463 U.S. 85 (1983) 35

South Carolina State Bd. of Dentistry v. FTC, 455 F.3d 436 (4th Cir. 2006) 21, 24

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 50

Swint v. Chambers Cty. Comm'n, 514 U.S. 35 (1995) 18, 23, 31, 32, 36, 38, 57, 58

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 31, 32, 47, 54

United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973) 44

United States v. MacDonald, 435 U.S. 850 (1978) 56

Van Cauwenberghe v. Biard, 486 U.S. 517 (1988) 39, 42, 43, 53

Will v. Hallock, 546 U.S. 345 (2006) 17, 18, 24, 28, 32, 36, 37, 38, 49

STATUTES AND RULES

28 U.S.C.

§ 1291 ..... 1, 17, 24, 27, 38, 43, 49, 57, 58

§ 1292 ..... 9, 16, 23, 46, 56, 58, 59, 60

§ 2072 60

TABLE OF AUTHORITIES—Continued

Page

Ariz. Rev. Stat.

§ 30-813 7

§ 40-202(B) 6, 10

§ 40-286 7

§ 48-2302 5

§ 48-2383 6

Fed. R. Civ. P. 12(b)(6) 8, 24

Fed. R. Civ. P. 23(f) 61

Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 ..... 8, 9, 33, 34

Rules Enabling Act Amendments, 28 U.S.C. § 2071 *et seq.* 60

Sherman Act, 15 U.S.C. § 1 *et seq.* 2, 20, 56

OTHER AUTHORITIES

Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure (3d ed. 2017)

§ 3911.1 58

§ 3911.2 39

§ 3914.10 34

§ 3929 & n.30 46

Federal Trade Commission, *Report of the State Action Task Force* (Sept. 2003) 32

TABLE OF AUTHORITIES—Continued

Page

Minutes of Fall 2014 Mtg. of Advisory Cmte. on Appellate Rules (Oct. 20, 2014) 61

Minutes of Spring 2010 Mtg. of Advisory Cmte. on Appellate Rules (Apr. 8 and 9, 2010) 60

Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law (4th ed. 2014) 21, 33, 34

INTRODUCTION

Congress has vested the courts of appeals with jurisdiction over "final decisions of the district courts." 28 U.S.C. § 1291. This finality mandate "preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice." *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017). Thus, although this Court has held that a "narrow class of decisions that do not terminate the litigation" may "be treated as 'final'" under Section 1291, it has "also repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867-68 (1994) (internal citation omitted). Particularly given the other avenues for pursuing immediate review, this Court has been reluctant to expand this "class of collaterally appealable orders." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 (2009).

Petitioner Salt River Project Agricultural Improvement and Power District (SRP) hopes to transform this narrow exception into a broad authorization for interlocutory appeal. Attempting to analogize to the denials of certain immunities, SRP contends that all public entities should be entitled to an immediate appeal as of right from orders rejecting the state-action defense to federal antitrust liability established in *Parker v. Brown*, 317 U.S. 341 (1943).

Yet SRP elides a critical distinction between those immunity doctrines and the *Parker* defense. Qualified immunity, sovereign immunity, and other similar protections are recognized immunities from *suit*. They are designed to protect particular types of defendants from being subject to particular types of litigation. For that reason, any denial of such an immunity is effectively "final"—if appeal is delayed until final judgment, the right to be free of litigation already will have been lost.

Parker, by contrast, establishes no such immunity from litigation. Rather, it represents this Court's interpretation of the substantive provisions of the Sherman Act, 15 U.S.C. § 1 *et seq.* In *Parker*, this Court held that Congress did not intend the general prohibition on anticompetitive restraints to supersede certain kinds of state regulation; if the defense applies, the challenged conduct does not violate the antitrust laws. Because *Parker* thus shields certain conduct from *liability*—and not certain defendants from litigation itself—no right protected by *Parker* is lost by requiring defendants to await final-judgment appeal.

For this fundamental reason, the court of appeals correctly held that the denial of a *Parker* defense is not "effectively unreviewable" after final judgment, and thus fails that requirement for interlocutory appeal of so-called "collateral orders." Pet. App. 6a-11a; *see Mohawk*, 558 U.S. at 105. If the district court's denial is erroneous, any judgment imposed as a result can be reversed after final judgment. Because *Parker* affords no immunity from trial, the purported harm to state or local interests caused by continued litigation is no

different from that engendered by any number of district court orders denying potentially dispositive motions. Were SRP's contentions taken to their logical conclusion, every suit against a public entity or challenging a state statute would give rise to repeated interlocutory appeals, substantially eroding Section 1291's finality requirement.

Additionally, a *Parker* denial is not completely separate from the merits, another collateral-order prerequisite. Quite the contrary: because *Parker* governs the scope of antitrust liability, it *is* a merits question. And regardless, the complex inquiry required to assess the *Parker* defense overlaps significantly with the other substantive issues presented in an antitrust claim, requiring scrutiny of the same facts. Allowing piecemeal appeals of *Parker* denials would thus produce precisely the sort of inefficiencies that the separateness requirement is intended to avoid.

Finally, a *Parker* denial is unlikely to conclusively resolve whether the *Parker* defense is available—yet another reason it fails the collateral-order requirements. Because *Parker*'s application will depend on an assessment of a variety of relevant facts, a district court's decision on a motion to dismiss or at summary judgment often will not be its final word on the *Parker* issue. Indeed, the district court here expressly stated it would revisit it.

Appellate jurisdiction is defeated if even one of these "stringent" requirements remains unsatisfied.

Orders denying *Parker* defenses fail all three. The decision below should be affirmed.

STATEMENT

Because SRP attempts to appeal the denial of a motion to dismiss, all factual allegations stated in respondent SolarCity's complaint must be taken as true. *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 5 (2010).[1]

A. SolarCity

SolarCity is America's largest installer of rooftop solar energy systems. J.A. 12 (¶16). It designs, manufactures, and sells its systems to residential and commercial customers. J.A. 12 (¶16). SolarCity's customers use these systems to generate electricity. J.A. 24 (¶70). When a system generates more electricity than the customer needs, the customer can transfer this excess electricity to a connected electrical grid for others to use. J.A. 25 (¶¶74-76). These rooftop solar energy systems are sometimes referred to as "distributed" solar, as distinguished from centralized, utility-scale solar power plants. J.A. 8 (¶3 n.1). By buying or leasing such systems, customers reduce the demand for electricity sold by electrical utilities. J.A. 19-20 (¶¶50, 52).

---

[1] Although SolarCity changed its name to Tesla Energy Operations, Inc. in January 2018, this brief refers to respondent as "SolarCity" to be consistent with the proceedings below and SRP's opening brief.

B. SRP

SRP is one of the nation's largest electric utilities. J.A. 12 (¶18). It sells electricity and transmission services to nearly a million customers in the Phoenix metropolitan area. J.A. 12 (¶18). It is a monopolist, providing more than 95% of the electricity used by retail customers within its geographic market. J.A. 20 (¶¶53-55).

SRP is also a "nominal public entit[y]" under Arizona law. *Ball v. James*, 451 U.S. 355, 368 (1981) (addressing constitutional challenge to SRP's acreage-based voting scheme); Ariz. Rev. Stat. § 48-2302. Private landowners created SRP in 1902 and later lobbied the Arizona legislature for a statute denominating SRP a political subdivision. *Ball*, 451 U.S. at 357-58. Having achieved this status, SRP could issue tax-exempt bonds for water-management projects. *Id.* at 358-59. The ability to "raise revenue through interest-free bonds" was the "sole legislative reason" for granting SRP this designation. *Id.* at 369.

Although SRP is nominally public, its functions remain "purely business and economic, and not political and governmental." *Local 266, I.B.E.W. v. Salt River Project Agric. Improvement & Power Dist.*, 275 P.2d 393, 402 (Ariz. 1954). Private landowners continue to own and run SRP. *Ibid.* Its retail electric operations are considered "proprietary" activities for nearly all purposes, *City of Mesa v. Salt River Project Agric. Improvement & Power Dist.*, 373 P.2d 722, 729 (Ariz. 1962), and its relationship with its customers is

"essentially that between consumers and a business enterprise," *Ball*, 451 U.S. at 370.

The landowners who control SRP benefit personally from SRP's electricity sales. *Id.* at 369 n.17; J.A. 13-14 (¶¶24, 29). The "profits from the sale of electricity are used to defray the expense in irrigating * * * private lands for personal profit." *Local 266*, 275 P.2d at 393, 402. Thus, SRP "does not function to 'serve the whole people' but rather [SRP] operates for the benefits of these 'inhabitants of the district' who are private owners." *Id.* at 403.

SRP's governance structure reinforces these private interests. Only individuals who own land in SRP's original geographic area can vote in SRP elections. J.A. 14 (¶32). A substantial percentage of SRP's electricity customers have no right to vote in SRP elections at all. J.A. 14 (¶32). And for a majority of the SRP Board seats, the value of each landowner's vote is proportionate to landholdings—so that a vote cast by the holder of ten acres counts ten times as much as a vote cast by the holder of one acre. Ariz. Rev. Stat. § 48-2383.

SRP's retail electric business is also largely unregulated, allowing it to determine the rates its customers pay. J.A. 18 (¶42). Arizona has, however, declared a policy in favor of competition—stating that "a competitive market shall exist in the sale of electric generation service." Ariz. Rev. Stat. § 40-202(B). It has also enacted state-antitrust savings clauses to ensure that utilities, including "public power utilities,"

do not use their market power to restrain competition. Ariz. Rev. Stat. § 30-813; *see* § 40-286 (same with respect to private utilities).

C. SRP's Anticompetitive Conduct

For many years, SRP promoted rooftop solar systems (including SolarCity's) through customer incentives and rebates. J.A. 24-25 (¶¶72-76). But these systems became increasingly cost-competitive with SRP's own services. J.A. 27-28 (¶¶78-86). In response to this growing threat, SRP began to use its monopoly power to eliminate competition from rooftop solar—which it dubbed "the enemy." J.A. 19-20 (¶51), 36-37 (¶119).

Most significantly, SRP adopted a new, punitive price structure designed to make distributed solar cost-prohibitive. J.A. 34-35 (¶¶112-15, 119). This new regime forces any residential customer who installs a rooftop solar system to pay approximately 65% more than before. J.A. 8-9 (¶¶5-6), 32-33 (¶¶107-08). By contrast, SRP increased the average bill for nonsolar residential customers by only 3.9%. J.A. 8-9 (¶5). Commercial solar customers were similarly penalized, with annual increases of about $24,000—increases not imposed on nonsolar customers. J.A. 10, 34 (¶¶10, 111).

SRP's new rate plan succeeded in defeating "the enemy." New applications to install distributed solar systems dropped by over 96%. J.A. 9 (¶7), 39-40 (¶123).

As a result, SolarCity was forced to stop selling its systems in SRP's territory. J.A. 41 (¶125).[2]

D. District Court Proceedings

1. In response to these anticompetitive actions, SolarCity filed suit against SRP, alleging violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. J.A. 49-53 (¶¶143-75). SolarCity also advanced state-law antitrust and tort claims. J.A. 54-59 (¶¶176-217).

SRP moved to dismiss for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). It argued, among other things, that the state-action doctrine recognized in *Parker* required dismissal of SolarCity's antitrust claims. Pet. App. 67a. It further contended that the Local Government Antitrust Act of 1984 (LGAA), 15 U.S.C. §§ 34-36, precluded these claims to the extent SolarCity sought damages.

2. The district court denied in part SRP's motion to dismiss. As the court recognized, to prevail on a *Parker* defense, a defendant generally must show: (1) that "the State has articulated a clear and affirmative policy to allow the anticompetitive conduct" and (2) that "the State provides active supervision of

---

[2] While SRP attempts to appeal the denial of its motion to dismiss, its statement of facts goes beyond the pleadings in addressing its conduct. Br. 7-8. It quotes a declaration submitted at the summary judgment stage, cites an extra-record source for a purported consensus about pricing challenges, and asks this Court to take judicial notice of another document that it unsuccessfully sought to introduce at both the district court and court of appeals. Br. 7-8; *see* Pet. App. 20a n.1, 44a.

anticompetitive conduct." Pet. App. 67a (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992)). The court concluded it could not determine on the pleadings whether SRP met either of those requirements, as both issues were "factual ones which are inappropriately resolved in the context of a motion to dismiss." Pet. App. 67a (alterations omitted). SolarCity had "allege[d] [1] that Arizona has a policy permitting competition in the relevant market and [2] that [SRP] operates without supervision," and that was "all that [was] necessary at this stage." Pet. App. 67a. SRP's brief in this Court conspicuously fails to mention the district court's active-supervision holding. *Cf.* Br. 10.

The district court did, however, accept SRP's argument that the LGAA shielded it from SolarCity's antitrust damages claims. Pet. App. 64a-65a, 68a-69a.

SRP filed a notice of appeal, relying on Section 1291. J.A. 2.

3. After filing its notice of appeal, SRP asked the district court to certify its order for interlocutory appeal under 28 U.S.C. § 1292(b). J.A. 3.

The district court declined to do so, concluding that SRP had not demonstrated any substantial ground for disagreement on its proffered *Parker* defense. Pet. App. 25a. Departing in part from the reasoning of its prior order, the district court accepted SRP's contention that whether SRP satisfied *Parker*'s clear-articulation prong was a question of law, not fact. Pet. App. 25a. But it explained that, regardless, "had the Court reached the issue as a matter of law, it would

have concluded that Arizona does not have a clearly articulated policy to displace competition in the retail electricity market." Pet. App. 27a. Rather, as the district court emphasized, "[t]he clearly articulated policy in Arizona *favors* competition." Pet. App. 27a (citing Ariz. Rev. Stat. § 40-202(B); emphasis by district court).

Notably, the court did not disturb its conclusion that whether SRP satisfied the active-supervision prong was a question of fact that must await further development. Pet. App. 25a-27a; *see* Pet. App. 26a n.2 (emphasizing that SRP "only takes issue with the Court's finding that whether Arizona has a clearly expressed and articulated policy displacing competition in the retail electricity market was a question of fact"). The court also made clear that it "did not make a final decision on the state-action doctrine" and that SRP was "free to raise" the issue at summary judgment. Pet. App. 33a n.7.

E. Ninth Circuit Proceedings

The court of appeals dismissed SRP's appeal for lack of jurisdiction, rejecting SRP's argument that the denial of a *Parker* defense falls within the small class of "collateral orders" that may be appealed before final judgment. Pet. App. 4a; *see Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

The court of appeals trained its focus on the third of the three "*Cohen*" requirements for an appealable collateral order: whether the issue would "evade effective review if not considered immediately."

Pet. App. 5a. The court viewed the critical question to be "whether the state-action immunity doctrine provides immunity from suit or immunity from liability." Pet. App. 8a. As it explained, while this Court has "allowed immediate appeals from denials of Eleventh Amendment immunity, absolute immunity, and qualified immunity," it has done so because "those immunities are immunities from suit." Pet. App. 7a-8a (internal citations omitted). But "[u]nlike immunity from suit, immunity from liability can be protected by a post-judgment appeal." Pet. App. 8a.

The court of appeals concluded that *Parker* provides immunity from liability, not suit. The court explained that *Parker* is premised on the conclusion that Congress did not intend the Sherman Act to block state laws or regulations. Pet. App. 9a. As the court concluded, "[a] denial of a motion to dismiss based on state-action immunity is thus no different from other denials of dismissal" because a defendant "may move to dismiss for failure to state a claim" whenever he "is sued under a statute that he believes was never meant to apply to him." Pet. App. 9a. Recognizing that interlocutory appellate jurisdiction has never been available for such a broad class of district court orders, the court saw no basis for creating a *Parker* exception. Pet. App. 9a-11a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that a district court's interlocutory denial of a defendant's *Parker* defense is not an appealable "collateral order." Such an order does not meet any of the three requirements for interlocutory appeal: it does not conclusively determine the disputed question; it is not completely separate from the merits; and it is not effectively unreviewable following final judgment.

I. As the Ninth Circuit held, an order rejecting a state-action defense fails the third requirement for interlocutory review because it can be effectively reviewed after final judgment. That is because the *Parker* doctrine establishes an exception from antitrust liability, not an immunity from suit. *Parker* is an interpretation of the Sherman Act's liability provisions based on this Court's conclusion that Congress did not intend to prohibit certain types of state regulation. A State's ability to regulate can be fully vindicated by reversal of any ultimate liability judgment. Nothing in the Sherman Act or this Court's decisions interpreting it suggests that Congress also intended to shield certain defendants from litigation altogether. For that reason, a *Parker* defense, like other liability issues, can be effectively reviewed following final judgment. No protected interest is lost by the delay.

Seeking to avoid this analysis, SRP has changed theories since the Ninth Circuit proceedings, now contending that the only relevant consideration is the "importance" of the interests supposedly threatened by

awaiting final judgment. But this Court has invoked "importance" only to further *narrow* the category of appealable collateral orders. It has held that an order denying an immunity from suit may be appealed only if the immunity in question *also* is sufficiently important. Because *Parker* provides defendants no immunity from suit, there is no need to conduct this importance inquiry.

In any event, the particular interests SRP cites to demonstrate "importance" cannot justify immediate appeal of *Parker* denials. Analogizing to sovereign immunity and qualified immunity, SRP contends that the *Parker* doctrine similarly protects States' dignitary interests and the efficiency and initiative of government officials. Yet these interests have been held to justify immunity from suit, and thus immediate interlocutory appeal, only where sovereign and qualified immunity actually apply—namely, in damages actions against sovereign states or government officials. Only in damages actions against these specific types of defendants does the litigation itself (as opposed to any ultimate judgment) offend the asserted interests. But the class of *Parker* orders posited by SRP would encompass many suits where the litigation itself does not offend those interests: *Parker* can be invoked by an array of public entities as a defense against antitrust actions seeking different types of relief. And even assuming some subset of *Parker* cases implicates the particular interests underlying sovereign and qualified immunity, those interests are adequately protected by the sovereign-immunity

doctrine itself (which shields sovereign states in antitrust cases as elsewhere) and the LGAA (which protects local officials from damages claims).

Ultimately, a district court's order denying a *Parker* defense no more implicates the dignitary and efficiency interests SRP invokes than do many garden-variety orders refusing to dismiss a claim. Indeed, States' dignitary interests (at least as SRP characterizes them) would be equally offended by suits advancing preemption or constitutional claims, but this Court has never suggested that any order permitting such claims to proceed is effectively unreviewable following final judgment. Likewise, any suit that challenges government action might affect the efficiency and initiative of government officials, but this Court has made clear that such impairment cannot transform every order permitting such litigation into a Section 1291 "final decision."

II. Orders denying a *Parker* defense also fail the second collateral-order requirement: they are not completely separate from the merits. To the contrary, because *Parker* is an interpretation of the substantive scope of the Sherman Act, it is itself a merits issue. If *Parker* applies, the conduct does not violate the federal antitrust laws at all. That is unlike the immunities on which SRP relies, which may apply even if the defendant violated the law.

Nor is a *Parker* defense completely separate from the other merits issues that must be determined in deciding an antitrust claim. *Parker* requires a complex,

multifactor inquiry into whether a State authorized the challenged anticompetitive conduct, the nature of the entity involved, the defendant's incentives to restrain the workings of the market for private gain, and the degree to which the State supervises such restraints. The analysis of these facts and circumstances overlaps substantially with the assessment required to determine if the challenged conduct is unjustifiably anticompetitive, an inquiry that likewise requires examining the competitive marketplace and the defendant's place within it.

Recognizing this inevitable overlap, SRP attempts to restrict the class of appealable *Parker* orders to denials premised on purely "legal" determinations. But the order here does not even fall within that subcategory: the district court rejected SRP's *Parker*-based motion to dismiss because of unresolved factual questions regarding both the clear-articulation and active-supervision requirements. Moreover, SRP's proposed distinction between "legal" and "factual" denials would prove unworkable, as it would both (1) lead to interlocutory appeals that fail to resolve the ultimate *Parker* issue and (2) generate appellate jurisdictional disputes about whether a particular *Parker* order fits within the so-called "legal" subcategory. In any event, even "legal" *Parker* denials would not be completely separate from the merits: *Parker* itself remains a merits question, and it will still often overlap with the inquiry into the anticompetitive effects of the challenged conduct.

III. For two independent reasons, the remaining collateral-order requirement—conclusiveness—also is not satisfied here. First, as a class, orders denying *Parker* defenses are not conclusive. Because *Parker*'s application often will depend on a variety of facts and circumstances that develop over the course of litigation, a district court that initially denies a *Parker* defense at, say, the motion-to-dismiss stage, may later find *Parker*'s requirements satisfied at summary judgment or following trial.

Second, the particular district court order at issue here was expressly not conclusive. The district court stated that further factual development was necessary and that it made no "final decision" on the merits of SRP's *Parker* defense. For that reason alone, appellate jurisdiction is lacking under the plain text of Section 1291: as this Court has held, an order cannot be a "final decision" if the district court has characterized its decision as tentative.

IV. Antitrust defendants such as SRP have other means to pursue interlocutory appeals from orders rejecting *Parker* defenses, including Section 1292(b). This Court also is authorized to issue rules designating particular categories of prejudgment orders immediately appealable. This rulemaking process provides a better mechanism to remedy any need for additional avenues for appeal than would the unwarranted extension of the collateral-order doctrine SRP demands here.

ARGUMENT

"From the very foundation of our judicial system, the general rule has been that the whole case and every matter in controversy in it [must be] decided in a single appeal." *Microsoft*, 137 S. Ct. at 1712 (brackets by Court); *see* 28 U.S.C. § 1291. The collateral-order doctrine is a "narrow exception" to this rule of finality. *Digital Equip.*, 511 U.S. at 867. The doctrine provides for appeal only from district court orders that satisfy each of three requirements: they must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 546 U.S. 345, 349 (2006) (brackets by Court). "The[se] conditions are stringent, and unless they are kept so, the underlying doctrine will overpower the substantial finality interests § 1291 is meant to further." *Id.* at 349-50. Moreover, not only must the particular order a defendant wishes to appeal satisfy these requirements, but the "entire category to which a claim belongs" likewise must do so. *Mohawk*, 558 U.S. at 605. District court orders denying *Parker* defenses fail each of these requirements.

I. AN INTERLOCUTORY DENIAL OF A *PARKER* STATE-ACTION DEFENSE CAN BE EFFECTIVELY REVIEWED ON APPEAL FROM FINAL JUDGMENT

This Court may resolve the question presented on the same straightforward basis as the court of appeals: because the interlocutory denial of a *Parker* defense

may be effectively reviewed following final judgment, it does not satisfy the third of the three collateral-order requirements.

A. Because *Parker* Establishes An Exemption From The Antitrust Laws' Substantive Prohibitions, Orders Denying The Defense Are Not Effectively Unreviewable

1. An order is "effectively unreviewable only where [it] involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 498-99 (1989). Some categories of orders satisfy this requirement by resolving legal issues that simply cannot be meaningfully addressed following final judgment. For example, the appeal of an order rejecting a defendant's claim to be free of involuntary medical treatment would "come[ ] too late" were it available only after the defendant had undergone forced medication. *Sell v. United States*, 539 U.S. 166, 177 (2003).

This Court has extended this principle to cover a limited category of claims that involve a defendant's right to be immune from litigation altogether. Unlike claims to be exempt from liability—the prototypical issue reviewed following final judgment, *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 43 (1995)—claims of absolute presidential immunity, qualified immunity, Eleventh Amendment immunity, and Double Jeopardy all involve a "right to avoid trial." *Will*, 546 U.S. at 350. Each of these claims could,

in theory, be reviewed following trial and judgment; an appellate court can, for example, reverse a conviction that violates Double Jeopardy. *Abney v. United States*, 431 U.S. 651, 660 (1977). But such post-judgment review is inadequate because by that point defendants will already have been irrevocably deprived of the right to avoid trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity "is an *immunity from suit* rather than a mere defense to liability; like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial" (emphasis by Court)); *accord, e.g.*, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 & n.5 (1993) (sovereign immunity); *Abney*, 431 U.S. at 662 (Double Jeopardy). For these types of claims, the "heart of the issue" is whether there "is in fact an entitlement not to stand trial." *Mitchell*, 472 U.S. at 525.

As this Court has also recognized, however, creative litigants seeking interlocutory appeals may attempt to characterize any denial of a motion to dismiss or for summary judgment as implicating a right to avoid trial. "[V]irtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" *Digital Equip.*, 511 U.S. at 873. Thus, courts must "view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Id.* at 874. Only an "'explicit statutory or constitutional guarantee that trial will not occur'"—or, as is true of qualified immunity, an immunity from litigation itself that is well-grounded in "public law"—has sufficed. *Id.* at 874, 875 (quoting

Midland Asphalt Corp. v. United States, 489 U.S. 794, 801 (1989)). The Court has emphasized that such an immunity from suit is "a rare form of protection." *Digital Equip.*, 511 U.S. at 879.

2. The *Parker* doctrine confers no such immunity from suit. Instead, *Parker* merely holds that certain state activities fall outside the substantive scope of the antitrust laws.

This Court's decision in *Parker* makes that distinction clear. There, the Court confronted an antitrust suit against officials administering California's raisin-marketing program. *Parker*, 317 U.S. at 344. The Court assumed that the program would violate the Sherman Act were it run by private parties, and also that Congress had the power to prohibit a State from implementing such a program. *Id.* at 350. But the Court concluded that Congress had not done so, finding "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51. *Parker* did not hold or even suggest that Congress, by its silence, intended to provide state entities with immunity from *trial* on antitrust claims. Rather, it concluded that given the Sherman Act's "words and history, it must be taken to be a prohibition of individual and not state *action*." *Id.* at 352 (emphasis added). In other words, *Parker* held that certain state "action[s]" are outside the Sherman Act's prohibitory scope, not that any particular class of defendants is exempt from Sherman Act litigation.

Subsequent decisions confirm that *Parker* rested on an interpretation of the scope of the federal antitrust statutes' liability provisions. Never has this Court indicated that this "disfavored" exception to the more general antitrust mandate of "free enterprise and economic competition" is intended to relieve defendants from litigation. *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013). To the contrary, it has reiterated that *Parker* holds only that the Sherman Act "should not be read to bar States from imposing market restraints as an act of government." *Ibid.*; *see also, e.g.*, *Ticor Title*, 504 U.S. at 632 (*Parker* "announced the doctrine that federal antitrust laws are subject to supersession by state regulatory programs"); *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 n.18 (1985) ("the state action doctrine is an implied exemption to the antitrust laws").[3]

---

[3] Although this Court occasionally has referred to *Parker* as establishing an antitrust "immunity," it has never characterized it as an immunity from suit. *South Carolina State Bd. of Dentistry v. FTC*, 455 F.3d 436, 445 (4th Cir. 2006); *see Segni v. Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987) ("Words like 'immunity,' sometimes conjoined with 'absolute,' are often used interchangeably with 'privilege,' without meaning to resolve issues of appealablility." (internal citation omitted)). Similarly, a treatise has observed (as SRP notes, Br. 38) that antitrust suits against public officials may be costly and should be resolved on the pleadings or at summary judgment when possible, IA Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶222b (4th ed. 2014), but the treatise expressly declines to take a position on the question presented here, *id.* ¶228e.

To be sure, the *Parker* doctrine is grounded in "principles of federalism and state sovereignty." *Patrick v. Burget*, 486 U.S. 94, 99 (1988). But many doctrines are influenced by federalism principles; that does not make them immunities from litigation or render any order involving those doctrines immediately appealable. In *Parker*, this Court invoked federalism principles for different reasons to achieve different ends than in the qualified- and sovereign-immunity contexts relied on by SRP. The qualified- and sovereign-immunity doctrines are recognized immunities from litigation because (in certain specific circumstances) subjecting government officials or sovereign states to a *trial* is unjustifiably "disruptive of effective government," *Mitchell*, 472 U.S. at 526, and offensive to "States' dignitary interests," *Puerto Rico Aqueduct*, 506 U.S. at 146.

By contrast, *Parker* considered federalism principles only in construing the Sherman Act's *liability* provisions. The Court invoked as a canon of statutory construction the principle that "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker*, 317 U.S. at 351. Thus, the "federalism and state sovereignty" principles that animate *Parker* reflect the entirely different concern of precluding federal interference with States' actions in the marketplace. *Patrick*, 486 U.S. at 99.

Parker's distinct focus is manifest in its application to suits against private parties. Qualified immunity and sovereign immunity extend only to certain

classes of government defendants, because protecting those defendants from trial is the purpose of those doctrines. *Mitchell*, 472 U.S. at 526; *Puerto Rico Aqueduct*, 506 U.S. at 146. But *Parker* is concerned with shielding state-regulated *activities* from federal antitrust interference—not with protecting particular defendants from litigation. Its "federalism rationale" thus "demand[s] that the state-action exemption also apply in certain suits against private parties." *Patrick*, 486 U.S. at 99-100. After all, private parties' anti-competitive actions may be "the product of state regulations." *Id.* at 100. As this Court has therefore made clear, "[t]he success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant." *S. Motor Carriers Rate Conference*, 471 U.S. at 58-59.

Parker's essential aim is to exempt certain activities from antitrust liability, and "[a]n erroneous ruling on liability may be reviewed effectively on appeal from final judgment." *Swint*, 514 U.S. at 43. It is only the antitrust defendant that is directly affected by continued litigation itself. Absent a preliminary injunction (which would itself be immediately appealable, 28 U.S.C. § 1292(a)(1)), the state law or regulation remains in place during the litigation. If the court of appeals ultimately concludes that the activities challenged are, in fact, properly deemed the State's own, it can reverse a finding of liability. Although it is "undoubtedly less convenient for a party * * * to have to wait until after trial to press its legal arguments, no protection afforded by *Parker* will be lost in the delay."

South Carolina State Bd. of Dentistry v. FTC, 455 F.3d 436, 445 (4th Cir. 2006).

To the extent SRP's attempted appeal implicates any "entitlement" that might be "effectively lost" absent interlocutory appeal, *Mitchell*, 472 U.S. at 526, it is the same "entitlement" that could be invoked by any defendant whose motion to dismiss for failure to state a claim is rejected: the supposed right conferred by Federal Rule of Civil Procedure 12(b)(6) not to be subject to litigation on a meritless claim. *See* Pet. App. 9a. As this Court has repeatedly recognized, however, to deem such an order "effectively unreviewable" following final judgment—and allow an interlocutory appeal on that basis—would subvert the principles of finality embodied in Section 1291. *E.g.*, *Will*, 546 U.S. at 351; *Digital Equip.*, 511 U.S. at 873.

B. The "Important" Interests SRP Invokes Cannot Justify Interlocutory Appeal

1. Importance is an additional, not a substitute, requirement

Effectively abandoning its position before the Ninth Circuit, SRP now insists this Court has rejected prior precedent deeming the presence of a "right to avoid trial" to be "decisive." Br. 27. Instead, SRP claims, the Court now applies a "functional" test that focuses solely on the "importance of the interests at stake." Br. 30, 41. That is not so.

a. SRP criticizes the Ninth Circuit for focusing on the distinction between an "immunity from liability" and an "immunity from suit" (Br. 27, 41), but SRP ignores its own role in inducing that focus. SRP contended below that "[t]he key question * * * is whether state-action immunity is actually akin to a defense to a cause of action rather than an entitlement to avoid suit altogether." C.A. Br. 42. Additionally, by abandoning the argument it made to the court of appeals, SRP has abandoned the rationale adopted by the only two Circuits that have held interim orders denying a *Parker* defense to be "effectively unreviewable." *Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391, 1395 (5th Cir. 1996) ("[w]e conclude that *Parker v. Brown* state action immunity shares the essential element of absolute, qualified and Eleventh Amendment immunities—an entitlement not to stand trial"); *Commuter Transp. Sys., Inc. v. Hillsborough Cty.*, 801 F.2d 1286, 1289 (11th Cir. 1986) (same). The novelty of SRP's argument is telling.

b. More importantly, SRP misreads this Court's decisions. This Court has not overruled its precedent recognizing the "crucial distinction" between a "right not to be tried" and an immunity from conviction or liability. *Midland Asphalt Corp.*, 489 U.S. at 801. In fact, two of its most recent collateral-order decisions emphasize that very distinction. In *Osborn v. Haley*, 549 U.S. 225 (2007), this Court held that the denial of Westfall Act substitution was immediately appealable because the statute was "designed to immunize covered federal employees not simply from liability,

but from suit." *Id.* at 238. And in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), this Court reiterated that qualified-immunity appeals satisfy the collateral-order doctrine's requirements "because such orders conclusively determine whether the defendant is entitled to immunity from suit," a question that "could not be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost." *Id.* at 2019.

This Court has emphasized that the claimed immunity from suit must *also* be sufficiently "important" to justify collateral-order appeal. *E.g.*, *Digital Equip.*, 511 U.S. at 878. But contrary to SRP's suggestion (Br. 30), this Court has not broadened the category of "effectively unreviewable" orders to encompass any order involving an "important interest." To the contrary, this Court has invoked "importance" only to further *narrow* the category of appealable orders: an order rejecting an immunity from suit can justify immediate appeal only if it *also* meets a certain threshold "level of importance." *Digital Equip.*, 511 U.S. at 878; *see* Pet. App. 11a n.3 (correctly noting the existence of this additional requirement). Importance is necessary, but not sufficient, to justify a collateral-order appeal. *Digital Equip.*, 511 U.S. at 871.

Justice Scalia's concurrence in *Lauro Lines*—which SRP characterizes as the supposed "turning point" in this Court's jurisprudence (Br. 29)—makes this clear. In *Lauro Lines*, the defendant argued that the district court's refusal to apply a contractual

forum-selection clause denied the defendant's "right not to be sued at all except in" the specified forum. 490 U.S. at 501. The Court held that any such right could be "adequately vindicated" after trial. *Ibid.* Explaining the majority's conclusion, Justice Scalia observed that the Court had long considered the "importance of the right asserted" to be "a significant part of [its] collateral order doctrine." *Id.* at 502 (Scalia, J., concurring) (citing, *inter alia*, *Cohen*, 337 U.S. at 546). Thus, Justice Scalia reasoned, although the *Lauro Lines* defendant's particular right not to be sued would be "positively destroyed[ ] by permitting the trial to occur and reversing its outcome," such post-judgment reversal "is vindication enough because the right is not sufficiently important to overcome the policies militating against interlocutory appeals." *Id.* at 502-03. In other words, even when a defendant is deprived of a right not to be tried, that particular right must also be "important" enough to demand departure from the ordinary rules of finality. *Ibid.*

A unanimous Court later applied this same reasoning in *Digital Equipment*. There, the defendant claimed that the appealed order contravened its explicit contractual "right not to stand trial." *Digital Equip.*, 511 U.S. at 871. Even so, this Court declared that "such a right by agreement does not rise to the level of importance needed for recognition under § 1291." *Id.* at 878. As the Court explained, "whether a right is 'adequately vindicable' or 'effectively reviewable[ ]' simply cannot be answered without a judgment about the value of the interests that would

be lost through rigorous application of a final judgment requirement." *Id.* at 878-79. And although statutory or constitutional rights not to stand trial would generally qualify as "'important' in *Cohen*'s sense," the defendant's privately conferred immunity from trial did not. *Ibid.*

Subsequent decisions have continued to apply "importance" as an additional requirement for an order to be effectively unreviewable, not as the sole relevant consideration. *Will v. Hallock* explained that only "some orders denying an asserted right to avoid the burdens of trial" merit appeal, and that the "further characteristic" separating those that do from those that do not is the "value of the interests" impaired. 546 U.S. at 351. As *Will* summarized: "it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Id.* at 353.

Similarly, in *Mohawk*—which involved a ruling requiring disclosure of privileged material rather than an asserted immunity from trial—this Court reiterated that any interest destroyed by delayed review also must be "sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes." 558 U.S. at 107. SRP cites *Mohawk* for the proposition that importance is "the decisive consideration," quoting *Mohawk's* statement that "the decisive consideration is whether delaying review until the entry of final judgment would imperil a substantial

public interest or some particular value of a high order." Br. 3, 30 (quoting *Mohawk*, 558 U.S. at 107). But *Mohawk* did not thereby hold importance to be the *only* consideration. Instead, it held that importance is "the decisive consideration" once it is determined that there is a right (such as the right not to disclose privileged materials) that would be lost by "rigorous application of a final judgment requirement." 558 U.S. at 107. Here, because *Parker* does not provide defendants with an immunity from suit (*supra* pp. 20-24), there is no such right and thus no need to conduct the additional inquiry into the "importance" of the interests *Parker* secures.

2. The interests SRP cites are insufficient

The interests SRP advances would not satisfy a freestanding "importance" test even if there were one. These interests—the "states' dignitary interests as sovereigns" and the "efficiency and initiative of state and local officials" (Br. 32)—may be "important in the abstract," but the "crucial question" is "whether deferring review until final judgment so imperils the interest[s] as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Mohawk*, 558 U.S. at 108. Although SRP attempts (Br. 32) to analogize to this Court's qualified- and sovereign-immunity decisions to establish the "importance" of the interests implicated by a *Parker* defense, the analogy fails.

a. As a class, denials of *Parker* defenses do not generally "imperil" the particular dignitary and efficiency interests that SRP invokes. *Mohawk*, 558 U.S.

at 108. Sovereign immunity protects a State's dignitary interests. But it does so only by precluding certain types of suits against certain types of entities: damages suits against the State. *Alden v. Maine*, 527 U.S. 706, 713 (1999); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). Likewise, qualified immunity promotes government efficiency and initiative. But it does so only by barring certain damages suits against government officials. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Accordingly, these doctrines permit injunctive suits against public entities and actors, and even damages suits against certain public-entity defendants. *E.g.*, *Behrens v. Pelletier*, 516 U.S. 299, 312 (1996) (where a "complaint seeks injunctive relief" against government officials, no qualified immunity is available); *Edelman*, 415 U.S. at 664 (the Eleventh Amendment permits "prospective" relief even if effectively against the State itself); *Owen v. City of Independence*, 445 U.S. 622, 623 (1980) ("there is no tradition of immunity for municipal corporations").

The limited nature of these immunities reflects the understanding that not all suits against public-entity defendants sufficiently implicate the relevant "dignitary" and "efficiency" interests to justify qualified- or sovereign-immunity protection. For example, the Eleventh Amendment protects the dignitary interests enjoyed by States because they "maintain certain attributes of sovereignty." *Puerto Rico Aqueduct*, 506 U.S. at 689. But because municipalities and similar state subdivisions do not share this sovereignty, it is "not an encroachment on 'state sovereignty'" (or an

affront to state dignity) to subject these public entities to suit. *Jinks v. Richland County, S.C.*, 538 U.S. 456, 466 (2003); *see Reynolds v. Sims*, 377 U.S. 533, 575 (1964) ("[S]ubdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities."). Similarly, the "efficiency and initiative" justification that supports qualified immunity for government officials does not apply to government entities themselves. As this Court has explained, while "the threat of *personal* monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process," "[t]he inhibiting effect is significantly reduced, if not eliminated, * * * when the threat of personal liability is removed." *Owen*, 445 U.S. at 655-56 (emphasis in original).

Where these particular "dignitary" and "efficiency" interests do not warrant immunity from litigation itself, the justifications for immediate appeal are likewise absent. Thus, this Court has held that district court orders rejecting a municipality's exemption from damages liability under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), can be effectively reviewed following final judgment. *Swint*, 514 U.S. at 43.

Parker, much like *Monell*, applies to defendants and remedies to which neither qualified nor sovereign immunity extend. That is true even if one disregards the private entities that may invoke the *Parker* defense. For example, *Parker* may exempt conduct by state subdivisions that this Court has determined are not entitled to sovereign or qualified immunity. *Town*

of Hallie v. City of Eau Claire, 471 U.S. 34, 38-39 (1985). *Parker* also may preclude injunctive actions that this Court has held do not offend either States' dignity or officials' initiative. *Id.* at 36, 47.

Indeed, the present case illustrates the breadth of the category of "public entities" that might invoke SRP's proposed rule. Although SRP is technically a "public entity," its public status is purely "nominal," *Ball*, 451 U.S. at 368, and it operates like a private business for its own private purposes, *City of Mesa*, 373 P.2d at 729; *supra* pp. 5-6. Like SRP, any number of other "public" entities without the protections of either sovereign or qualified immunity may invoke the *Parker* defense, including "hospital authorities, transportation authorities, electric cooperatives, * * * government-affiliated charitable or nonprofit corporations," and "state bar[s]." Federal Trade Commission, *Report of the State Action Task Force* 17-18 (Sept. 2003) (internal citations omitted). Were SRP successful here, all such entities would soon be asserting their right to immediately appeal the denial of their asserted *Parker* defenses.

Yet permitting litigation to proceed against the variety of public entities that may invoke *Parker* will not generally imperil the same "substantial public interest[s]" presented in damages suits against the State itself or government officials. *Will*, 546 U.S. at 353. Viewed as a class, *Parker* denials thus do not implicate the interests that render qualified- and sovereign-immunity claims effectively unreviewable following final judgment. *Swint*, 514 U.S. at 43.

Rather, as SRP itself acknowledges, *Parker* protects "'the States' power to *regulate*.'" Br. 33 (quoting *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1109 (2015)) (emphasis added). Because this "class of claims" is "adequately vindicated" by appeal following final judgment, it should not be appealable until then. *Mohawk*, 558 U.S. at 107; *Swint*, 514 U.S. at 43.

b. To the extent the interests SRP invokes are implicated in a subset of *Parker* denials, they are protected by other doctrines. If, for example, an antitrust plaintiff advances a claim against a sovereign State in a manner offending the dignitary interests protected by the Eleventh Amendment, the State can invoke sovereign immunity. Similarly, if an antitrust plaintiff seeks damages from local officials, those officials can invoke the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (LGAA). In fact, this statute provides broader protection for local governments than does the qualified-immunity doctrine, as the LGAA (1) shields both local officials and the governments for which they work, (2) applies regardless of whether the defendants have violated clearly established law, and (3) precludes not just damages awards but even most awards of attorneys' fees. *Id.* §§ 35-36; *see* Areeda & Hovenkamp ¶223d.

This case provides a fitting demonstration of the extent to which the "important" interests SRP invokes are already protected without any right to an interlocutory *Parker* appeal. Although the district court denied SRP's *Parker* motion, it granted SRP's

motion based on the LGAA to dismiss SolarCity's antitrust damages claims. Pet. App. 64a-65a. That relief—dismissal of damages claims—is the very protection this Court has deemed adequate to protect States' "dignitary interests" and preserve officials' "efficiency and initiative" in the sovereign-immunity and qualified-immunity contexts. And indeed, SRP could not have obtained such protection under either qualified or sovereign immunity, as it is neither a government official nor a sovereign. *Owen*, 445 U.S. at 632.

c. SRP's open-ended invocation of the "importance" of dignitary and efficiency interests cannot reasonably be cabined to orders denying public entities' *Parker* claims. If those interests were sufficiently important to warrant appeal here, they would justify appeal of a great number of other similar interlocutory orders. Indeed, "there is little to distinguish this defense from many other defenses to antitrust or other claims." 15A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3914.10 (3d ed. 2017).

The ultimate question in *Parker* cases is whether the federal antitrust laws preempt a State's supposed authorization of a challenged practice, an issue that turns on whether the State authorized the specific conduct at issue and exercised sufficient control over it. *See 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n.8 (1987) ("Our decisions reflect the principle that the federal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anti-competitive behavior."); Areeda & Hovenkamp ¶221a (characterizing *Parker* as part of a two-stage

preemption analysis). To the extent that an interlocutory denial of a *Parker* defense offends a State's dignitary interests at all, it does so only because it (provisionally) holds the asserted state law or policy preempted. Although SRP attempts to confine its proposed class of immediately appealable orders to those affecting public-entity defendants, this same supposed dignitary offense would occur when a private party's *Parker* defense is rejected. A State can "structure its economic policymaking" by implementing policies through private entities just as it does through "political subdivisions." *Cf.* Br. 34.

More significantly, SRP's rationale also would apply in a variety of cases involving the interaction of state and federal law. Nearly *any* district court order rejecting a defendant's argument that a state law survives federal preemption would offend the same "federalism and sovereignty interests" posited by SRP. Such orders would deny States "their fundamental sovereign prerogative to regulate their economies within their borders" (or other similarly "fundamental" regulatory interests). *Cf.* Br. 34. As with a *Parker* defense, the defendant's essential argument in such preemption cases is that Congress did not intend to preempt the particular state law or regulation. *E.g.*, *Shaw v. Delta Airlines*, 463 U.S. 85, 95-108 (1983) (addressing defendant's arguments that New York state law survived preemption provision of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*). In addition, district court orders allowing continued litigation of a constitutional

challenge to a state law would likewise threaten States' "sovereign prerogative" to regulate. Br. 34. The narrow, litigation-related "dignitary interests" this Court has recognized as justifying the immediate appeal of denials of sovereign immunity should not be extended to encompass such a wide-ranging and amorphous additional class of orders. *Puerto Rico Aqueduct*, 506 U.S. at 146-47.

Similarly, the efficiency interests SRP claims here are present in all suits involving public entities or officials. Whenever government officials "make a decision that displeases even a small segment of the public"—say, the inmates in a local jail, or the customers of a government-run utility—they may run the risk of being subject to the burdens of litigation. Br. 37. That is true whether the disgruntled parties are advancing an antitrust, constitutional, contract, or any other type of claim. Yet this Court has never held that such burdens justify interlocutory appeal whenever a district court denies a public entity or official's dismissal motion.

To the contrary, this Court has emphatically rejected that proposition. As already noted, this Court held in *Swint* that district court orders refusing to dismiss damages claims against cities and counties—the public entities to which SRP seeks to analogize—"may be reviewed effectively on appeal from final judgment." 514 U.S. at 43. Likewise, in *Will*, this Court rejected the contention that the refusal to apply the Federal Tort Claims Act's judgment bar is immediately appealable. 546 U.S. at 353. It so held even though as

a result litigation will proceed against government officials and "the efficiency of Government will be compromised and the officials burdened and distracted." *Ibid.* As the Court explained, "if simply abbreviating litigation troublesome to Government employees were important enough for *Cohen* treatment, collateral-order appeal would be a matter of right whenever the Government lost a motion to dismiss." *Ibid.*

Qualified immunity, by contrast, does not merely protect officials from litigation burdens; rather, it is designed to *promote* certain conduct. *Ibid.* As *Will* explained, "[t]he nub of qualified immunity is the need to induce officials to show reasonable initiative when the relevant law is not 'clearly established.'" *Id.* at 353. The doctrine encourages such initiative by providing public officials with a buffer in which to act freely (often in response to rapidly changing circumstances). *Harlow*, 457 U.S. at 818. Even where their actions are ultimately found to be illegal, they are protected from litigation so long as they could not "fairly be said to 'know' that the law forbade" their conduct. *Ibid. Parker*, on the other hand, does not depend on any presumption regarding what a "reasonably competent public official" should have known, *ibid.*, and thus it provides no similar buffer to promote "reasonable initiative," *Will*, 546 U.S. at 353. To the contrary, *Parker* erects a "disfavored" exception to antitrust liability, with doubts construed against the defense's application. *Phoebe Putney*, 568 U.S. at 236. While the grant of such a defense may "save trouble for the Government and its employees," that alone is not

enough to render its denial immediately appealable. *Will*, 546 U.S. at 353.

SRP attempts to resurrect this rejected "burden" argument by contending there is something special about antitrust litigation that warrants setting aside decisions like *Swint* and *Will*. *E.g.*, Br. 37, 41-42. True, antitrust litigation may be costly. Br. 37 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007)). But as this Court has recognized, the same may be said of constitutional and many other types of claims. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) ("Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government."). If this Court were to hold the costs of antitrust litigation are sufficiently great to demand the availability of immediate appeal, it would find itself in the business of delineating exactly which substantive claims satisfy SRP's newly devised "unusually onerous" standard. Br. 37. Soon enough, "28 U.S.C. § 1291 would fade out whenever the Government or an official lost an early round that could have stopped the fight." *Will*, 546 U.S. at 354. This Court should reject SRP's efforts to bring about this result—as it has consistently rejected similar efforts in the past.

II. THE *PARKER* STATE-ACTION DEFENSE IS NOT COMPLETELY SEPARATE FROM THE MERITS OF AN ANTITRUST ACTION

Interlocutory orders denying a *Parker* defense also fail the second of the three collateral-order requirements: they do not resolve issues "completely separate from the merits of the action." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). This requirement reflects the need to minimize the costs of the piecemeal appeals against which Section 1291 is directed. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). The final-judgment rule itself embodies the presumption that merits questions are most efficiently reviewed after final judgment on a fully developed record. 15A Wright & Miller § 3911.2; *Cohen*, 337 U.S. at 546. The costs of interlocutory appeal are also particularly high where courts will repeatedly consider the same or similar facts and legal issues because the order appealed "involve[s] considerations enmeshed in the merits of the dispute." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528 (1988). Accordingly, an issue is separate from the merits only if it is "significantly different from the fact-related legal issues that likely underlie the plaintiff's claim." *Johnson v. Jones*, 515 U.S. 304, 314 (1995). Denials of *Parker* defenses do not satisfy that requirement.

A. The *Parker* Inquiry Overlaps With The Merits

1. A *Parker* defense is not "completely separate from the merits of the action" for a simple reason: the applicability of *Parker* is itself a merits question.

As recounted above (*supra* pp. 20-24), the *Parker* doctrine is an interpretation of the scope of the Sherman Act. *Parker*, 317 U.S. at 344. In stark contrast to the issues this Court has held are separate from the merits of a claim—such as the imposition of a bond, *Cohen*, 337 U.S. at 546; the subjection to forced medication, *Sell*, 539 U.S. at 176; or the denial of an immunity to stand trial, *Mitchell*, 472 U.S. at 527-28—the *Parker* state-action inquiry goes to the very lawfulness of the defendant's underlying conduct. It is thus in no sense "collateral" to the merits. *Cohen*, 337 U.S. at 546.

This Court's treatment of qualified immunity appeals illustrates this critical distinction between merits and non-merits issues. *Mitchell* found "separateness" satisfied for qualified-immunity orders because whether a defendant has "an entitlement not to be forced to litigate the consequences of official conduct" is "distinct from the merits of the plaintiff's claim that his rights have been violated." 472 U.S. at 527-28. This Court continued: "The reason is that the legal determination that a given proposition of law was not clearly established at the time the defendant committed the alleged acts does not entail a determination of the 'merits' of the plaintiff's claim that defendant's actions were in fact *unlawful*." *Id.* at 529 n.10 (emphasis added); *see Richardson v. McKnight*, 521 U.S. 399, 403 (1997) (A "legal defense may well involve 'the essence of the wrong,' while [qualified] immunity frees one who enjoys it from a lawsuit whether or not he acted wrongly.").

SRP contends that addressing a *Parker* defense does not require deciding "whether the antitrust laws were violated." Br. 23. But that is not true. *See supra* pp. 20-24. If *Parker* applies, the Sherman Act does not prohibit the challenged conduct, no antitrust law is violated, and for that reason the defendant's actions are not "unlawful." *Parker*, 317 U.S. at 344; *see S. Motor Carriers Rate Conference*, 471 U.S. at 56 n.18. Resolving the *Parker* issue through an interlocutory appeal thus entails precisely the "determination of the 'merits' of the plaintiff's claim" that this Court has held inconsistent with the final-judgment rule embodied in Section 1291. *Mitchell*, 472 U.S. at 529 n.10. In other words, because *Parker* is one of the "fact-related legal issues that * * * underlie the plaintiff's claim," it fails the separability requirement. *Johnson*, 515 U.S. at 314.

2. Even if, as SRP suggests (Br. 19), the "merits" of an antitrust claim should be redefined as only whether a defendant's alleged conduct is unjustifiably anticompetitive, the *Parker* issue still would not be "completely separate" from the merits.

a. This is true even if a court might address a *Parker* defense without also deciding that a defendant's alleged conduct "was in fact anticompetitive." *Cf.* Br. 19-20. This Court has made clear that an ability to resolve a defendant's contention without deciding the ultimate merits (or, here, a subset of the merits) is not enough to render that contention "completely separate." *Coopers & Lybrand*, 437 U.S. at 468. A court can likewise review a *forum non conveniens* argument,

or a class certification motion, or a sanctions request, without resolving whether the plaintiff's underlying claims have merit. Yet this Court still has held that decisions on those issues fail the separability requirement because each may require courts to scrutinize facts, circumstances, or legal issues underlying the parties' dispute on the merits. *Van Cauwneberghe*, 486 U.S. at 528-29 (*forum non conveniens*); *Coopers & Lybrand*, 437 U.S. at 469 (class certification); *Cunningham v. Hamilton Cty.*, 527 U.S. 198, 205-06 (1999) (Rule 37 sanctions).

Even in the qualified-immunity context, this Court has held that some summary judgment denials do not satisfy the requirement of complete separateness. *Johnson*, 515 U.S. at 316. This Court has explained that denials turning on factual issues cannot be immediately appealed because "the close connection between this kind of issue and the factual matter that will likely surface at trial means" that a reviewing court would have to "canvass the record" in a manner that could be duplicated following trial. *Ibid.* Such overlap precludes interlocutory appeal. *Id.* at 314, 316-17.

In short, the critical factor in determining whether an issue is "completely separate" from the merits is whether it "may require" analysis of facts and considerations relevant to the merits, not whether it might be resolved without also resolving the merits. *Cunningham*, 527 U.S. at 205.

b. *Parker* involves just the sort of "significant inquiry into the facts and legal issues presented by" an antitrust plaintiff's claim that makes it "unsuited for immediate appeal as of right under § 1291." *Van Cauwneberghe*, 486 U.S. at 529.

Parker requires a complex, multi-factor inquiry into the defendant's challenged conduct to determine whether it should be deemed "the State's own." *Phoebe Putney*, 568 U.S. at 225. First, if the State itself is not conducting the activity in question, the defendant must show that "the State has articulated a clear policy to allow the anticompetitive conduct." *North Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1112. Next, if the defendant is a public entity, an examination of whether it is "controlled by active market participants" is necessary. *Id.* at 1114. Finally, if there is a "risk that active market participants will pursue private interests" through such control, the defendant also must demonstrate it is subject to the "active supervision" of the State. *Id.* at 1114, 1116.

Every step of this multi-part inquiry requires consideration of the same facts and circumstances that will have to be considered (or reconsidered) in determining whether the conduct challenged is anticompetitive. For example, the clear-articulation requirement requires a defendant to demonstrate that the particular anticompetitive conduct challenged "was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Phoebe Putney*, 568 U.S. at 229. That, in turn, requires examination of the conduct and its

surrounding circumstances to determine whether and to what extent such anticompetitive consequences were "'foreseeable.'" *Id.* at 231; *see Kay Elec. Co-op v. City of Newkirk, Okla.*, 647 F.3d 1039, 1043 (10th Cir. 2011) (Gorsuch, J.) ("simple permission to play in a market doesn't foreseeably entail permission to rough-house in that market unlawfully").

Following this approach, this Court in *Phoebe Putney* concluded that the State had not authorized the defendant's acquisition of another hospital through its grant of general corporate powers. 568 U.S. at 232. The Court reviewed details about the geographic scope of the hospital-services market and whether "merger of competitors would lead to a significant increase in market concentration." *Ibid.* These are the same sorts of facts and issues that would also be considered in later determining whether a merger would be unjustifiably anticompetitive. *E.g.*, *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 533-34 (1973).

The same overlap would occur in determining whether the active-supervision requirement applies. Assessing whether a defendant is controlled by market participants and thus has an incentive to restrain competition would involve considerations relevant to later determining whether a defendant's challenged restraint should be subject to per se condemnation, a "quick look" analysis of its purported costs and benefits, or full rule-of-reason treatment to determine its likely competitive effects. *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 500-01 (1988);

FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458-59 (1986).

Likewise, determining whether the State has "actively supervised" the challenged conduct would implicate merits questions. The inquiry requires an examination not just of whether an existing regulatory regime suggests the potential for supervision, but also of whether "state officials have undertaken the necessary steps to determine the specifics of the" challenged conduct and "in fact" exercised the necessary supervision. *Ticor Title*, 504 U.S. at 638. That inquiry, as this Court has recently reiterated, is fact-intensive and "depend[s] on *all* the circumstances of a case." *North Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1117 (emphasis added). In particular, it depends on the nature of the antitrust violation itself: the greater the anticompetitive threat, the greater the degree of state supervision that may be required. *Ticor Title*, 504 U.S. at 639 (emphasizing that supervision requirement was not met given "the gravity of the antitrust offense," price-fixing). This sort of detailed examination of the record is—as SRP does not contest (Br. 24)—inconsistent with the requirement that the issue be completely separate from the merits. *Johnson*, 515 U.S. at 316-17.

B. SRP Cannot Satisfy The "Completely Separate" Requirement By Creating A Subcategory Of "Legal" *Parker* Claims

SRP tries to avoid this overlap by rewriting the question presented. Although its petition asked

categorically whether all "orders denying state-action immunity to public entities are immediately appealable" (Br. i), SRP now asks this Court to resolve only "whether collateral-order appeal is * * * available from an order rejecting, *on legal grounds*, a public entity's claim of state-action immunity." Br. 2 (emphasis added); *see* Br. 14 ("Orders Denying State-Action Immunity To Public Entities On Legal Grounds Qualify For Immediate Appeal Under The Collateral Order Doctrine") (principal Argument heading). By "legal grounds," SRP appears to mean decisions turning only on the interpretation of statutes and similar legal authorities. Br. 20-23; *see Ashcroft*, 556 U.S. at 674. SRP's attempt to narrow the class of orders at issue fails for at least three independent reasons.

First, the rule SRP seeks would not save its own appeal. SRP does not attempt to appeal from "an order rejecting, on legal grounds, a public entity's claim of state-action immunity." Br. 2. Rather, as described above, the district court concluded that "factual" questions remained as to *both* the clear-articulation requirement and the active-supervision requirement, Pet. App. 67a—the latter holding being notably omitted from SRP's statement of the case (Br. 10). Although the district court's order denying Section 1292(b) certification later recharacterized the clear-articulation issue as a legal question, this certification order itself is not the subject of this appeal (nor could it have been). 15A Wright & Miller § 3929 & n.30. Regardless, in this subsequent order, the court did not revoke its earlier conclusion that the active-supervision issue presented

factual questions; instead, it noted that SRP's certification motion addressed only the clear-articulation prong. Pet. App. 25a-27a & n.2.

Rather than confront this issue, SRP simply asserts in conclusory fashion that, as an "electorally accountable public entity," it is "not subject to the 'active state supervision requirement.'" Br. 2 n.1. But the district court disagreed. Pet. App. 67a. And rightly so: a *municipality* is generally "excused" from the active-supervision requirement because its government is publicly elected and therefore "lack[s] the kind of private incentives characteristic of active participants in the market." *North Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1112-13 (citing *Hallie*, 471 U.S. at 45 n.9). No such presumption of public-mindedness is available to SRP. SRP "does not function to serve the whole people"; it is controlled by private landowners and "operates for the benefit of these" landowners. *Local 266*, 275 P.2d at 403. While SRP's board is elected by these private landowners (generally in proportion to their land holdings), that no more insulates it from the active-supervision requirement than does a dentistry board's "elect[ion] by other licensed dentists." *North Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1108. Given the "risk" these private landowners "will pursue private interests in restraining trade," SRP must demonstrate that its anticompetitive conduct is actively supervised by the State. *Id.* at 1114.

At the very least, whether SRP must satisfy this active-supervision requirement is itself a factual

question that turns on the extent to which it is controlled by private interests and acts to serve those interests. And whether SRP meets the active-supervision requirement likewise presents factual questions as to whether the State has "in fact" adequately supervised SRP's anticompetitive conduct. *Ticor Title*, 504 U.S. at 638. As SRP acknowledges, while some active-supervision decisions could conceivably turn on legal grounds, many others are based "on factual grounds." Br. 22-23. The district court's decision here falls in the latter category, as the court itself stated. Pet. App. 67a. As a result, even assuming some hypothetical set of "purely legal" *Parker* denials are appealable collateral orders (Br. 16), the order on appeal here was not a "purely legal" denial, and that alone is a basis to affirm the Ninth Circuit's decision dismissing SRP's appeal.

Second, SRP's proposed category of "legal" *Parker* denials is unworkable. In delineating the "categories of orders" to which the three-factor collateral-order test applies, this Court uses a functional approach that looks to "the competing considerations underlying all questions of finality," including "the inconvenience and costs of piecemeal appeal and the danger of denying justice by delay." *Johnson*, 515 U.S. at 315. Only in the qualified-immunity context has this Court drawn the sort of factual/legal distinction that SRP proposes. *Id.* at 317. It has refused to draw that line in other circumstances where it sees no "basis" for doing so. *Ibid.*; *see Puerto Rico Aqueduct*, 506 U.S. at 147 (declining to distinguish between sovereign-immunity

claims "bound up with factual complexities" and those that are not). Here, SRP provides no particular basis for dividing "legal" *Parker* decisions from "factual" ones—and there are strong reasons not to do so.

To start, SRP's proposed categorization would lead to the very piecemeal appeals and inefficiency that Section 1291's finality requirement is intended to eliminate. *Will*, 546 U.S. at 349-50. Even where the denial of a *Parker* defense is on solely legal grounds, the reversal of such a legal conclusion will not always resolve the *Parker* issue. SRP is mistaken in contending otherwise. *See* Br. 23-24. Take an order holding that a cited state statute provides no clear articulation for a defendant's conduct. Even if this legal conclusion were reversed in a prejudgment appeal, that would not necessarily mean the defendant's conduct is exempt from the antitrust laws. On remand, the district court often would still need to decide whether the defendant is subject to the active-supervision requirement and, if so, whether that requirement is satisfied. *North Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1112-14. While the appellate court's interlocutory intervention would have resolved one nondispositive (yet "legal") prong of *Parker*'s multifactor inquiry, it would have done little to advance the ultimate resolution of the dispute. All that such an interlocutory appeal would guarantee is significant delay. *See Coopers & Lybrand*, 437 U.S. at 474 (where district court could deny class certification on new grounds even after earlier denial was reversed in interlocutory appeal, "the potential for multiple appeals in every complex case is apparent and serious").

SRP's proposed subcategory would also create difficult jurisdictional questions for the courts of appeals. As the present case demonstrates, parties may often dispute whether a district court's denial of a *Parker* defense rests on legal or factual grounds. Courts of appeals therefore would be forced to make complex threshold determinations in nearly every case just to determine whether they have jurisdiction. For example, courts would have to draw fine lines between (1) decisions that rely on a state statute to hold that a state subdivision is not democratically accountable as a matter of law and (2) those that hold only that the statute does not defeat all possible inferences of private party control. *See North Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1114. Courts of appeals also would have to determine how to characterize decisions that appear to involve a mix of such inquiries. *See Ticor Title*, 504 U.S. at 638. In addition, parties might attempt to argue that a denial relying on the need for factual development can be characterized as reflecting legal error—contending, for example, that the district court erred in citing factual issues regarding the State's supervision because that requirement is inapplicable as a matter of law. *Cf.* Cert. Reply at 7-8. Refereeing such disputes would effectively require courts of appeals to decide part of the merits of the *Parker* defense to determine whether they have appellate jurisdiction to decide it. That would be a "strange scheme." *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92 (1998) (so denigrating a holding that would convert any merits question into a jurisdictional one).

This Court has explained that "administrative simplicity is a major virtue in a jurisdictional statute" and that "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Especially in light of this principle, any "incremental benefit" SRP's carve out for "legal" *Parker* denials might conceivably provide would be "outweighed by the impact of such an individualized jurisdictional inquiry on the judicial system's overall capacity to administer justice." *Coopers & Lybrand*, 437 U.S. at 473; *see Cunningham*, 527 U.S. at 209 (refusing to define class of orders in manner that "could not be easily administered"); *Mohawk*, 558 U.S. at 113 (citing "line-drawing difficulties" as reason not to extend collateral-order doctrine).

In all these respects, *Parker* denials diverge from the orders denying qualified immunity to which SRP attempts to analogize. *See* Br. 24-25. Unlike the multi-factor, mixed-law-and-fact *Parker* inquiry, qualified immunity generally turns on a single legal question: whether the defendant's conduct (either alleged or admitted) violates clearly established law. *Johnson*, 515 U.S. at 313. For that reason, the successful interlocutory appeal of such an order will definitively dispose of the issue. If the defendant's supposed conduct does not violate clearly established law, the defendant is entitled to qualified immunity. Such appeals therefore may promote rather than impair judicial efficiency.

Additionally, orders resolving purely legal qualified-immunity questions may be meaningfully distinguished from those holding only that material disputes of fact exist as to whether the defendant committed the alleged conduct—the fact-based orders this Court has held may not be immediately appealed. *Plumhoff*, 134 S. Ct. at 2019. Even this distinction has been the subject of some uncertainty. *Ashcroft*, 556 U.S. at 674. Yet it is far more tenable—and far less likely to produce repeated, unnecessary litigation—than is SRP's distinction between legal and factual *Parker* denials. SRP's proposed line will require courts of appeals not simply to evaluate whether the parties' dispute concerns the defendant's commission of the conduct alleged, *Plumhoff*, 134 S. Ct. at 2019, but whether the district court's particular application of the various factors relevant to the *Parker* inquiry are more aptly characterized as factual or legal. *Supra* p. 50.

Third and finally, even strictly "legal" *Parker* issues are not "completely separate from the merits of the action." *Coopers & Lybrand*, 437 U.S. at 468. Again, as explained above (*supra* pp. 39-41), any *Parker* decision—whether legal or factual—is part of the merits: whether the state-action doctrine applies determines the lawfulness of the defendant's conduct. SRP's gerrymandered subcategory does not enable it to escape this essential aspect of the *Parker* doctrine.

Determining whether a state statute clearly articulates a policy permitting the challenged restraint—SRP's quintessential "legal ground" for a *Parker* appeal (Br. 19-20)—will require courts to consider whether

this sort of conduct might have been "foreseeable" (circumstances likely to also bear on whether the conduct is anticompetitive). *Supra* pp. 43-44; *Phoebe Putney*, 568 U.S. at 229. Whether the apparent absence of any statute providing for specific supervision is significant (Br. 22-23) also may overlap with the legal inquiry into the anticompetitive dangers posed by the defendant's supposed conduct. *Supra* pp. 44-45; *Ticor Title*, 504 U.S. at 640. While some minimal overlap between a collateral order and the underlying merits does not necessarily defeat appealability (Br. 21 (citing *Osborn*, 549 U.S. at 238)), this sort of involved "scrutin[y] [into] the substance of the dispute between the parties" does. *Van Cauwenberghe*, 486 U.S. at 528.

III. INTERLOCUTORY ORDERS DENYING A *PARKER* STATE-ACTION DEFENSE ARE NOT CONCLUSIVE

SRP also cannot satisfy the remaining collateral-order requirement: conclusiveness. An order or decision is conclusive only if it is "made with the expectation that [it] will be the final word on the subject addressed." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277 (1988). Neither the general category of orders denying a *Parker* defense nor the particular order SRP attempts to appeal meets that standard.

A. The General Class Of Orders Denying *Parker* Defenses Is Not Conclusive

1. *Parker*'s applicability in a given case is a question that often cannot be definitively resolved on

the pleadings or at summary judgment. As explained, the applicability of a state-action defense depends on a number of different facts and circumstances. *Supra* pp. 43-45; *see North Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1114-16; *Phoebe Putney*, 568 U.S. at 229. Particularly because *Parker* is an affirmative defense, *Hallie*, 471 U.S. at 39, the relevant facts and circumstances considered may well change over the course of litigation as the defendant presents supporting evidence. As the case evolves from the pleading stage to summary judgment to trial, a district court "ordinarily would expect to reassess and revise" its determination whether *Parker* shields a defendant from liability. *Gulfstream Aerospace Corp.*, 485 U.S. at 277. This sort of "inherently tentative" order is not conclusive. *Ibid.*

A recent series of decisions from the Second Circuit illustrates the extent to which the *Parker* analysis may change as the litigation moves beyond the pleading stage. In *Freedom Holdings, Inc. v. Spitzer*, the court of appeals considered the sufficiency of a complaint alleging that a state policy effectively allowed tobacco manufacturers to enter into a market-sharing agreement in violation of the antitrust laws. 357 F.3d 205, 208 (2d Cir. 2004). Reversing the district court's initial dismissal, the Second Circuit held that the defendants had not satisfied *Parker* because it was not yet clear whether the challenged program was sufficiently related to the State's public health goals or whether there was any means for active state supervision over tobacco manufacturers. *Id.* at 230-32.

Following a bench trial, however, the district court found *Parker* applicable, concluding that the defendants' "proofs" demonstrated both that the program had "brought about a substantial reduction in cigarette consumption and substantial reimbursements" to the State, and that the State had "closely tracked the actual workings" of the program through an auditing mechanism. *Freedom Holdings, Inc. v. Cuomo*, 592 F. Supp. 2d 684, 701-02 (S.D.N.Y. 2009). On appeal, the Second Circuit affirmed, noting in particular that "[t]he active supervision required to secure state action immunity necessarily depends on the facts of each case." *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 61 (2d Cir. 2010). Such potential for revisiting earlier rulings is inherent in the fact-intensive *Parker* analysis, making it a poor candidate for interlocutory appeal.

2. SRP hopes to avoid this conclusiveness problem in two ways. First, SRP again seeks to narrow the relevant category of *Parker* denials to those raising "purely legal" issues. Br. 16. But as explained, this effort fails both because SRP's own appeal does not raise such "purely legal" issues and because such a narrowed category is unworkable. *Supra* pp. 45-52.

Second, SRP asserts that, like qualified immunity, the denial of a *Parker* defense "'finally and conclusively determines the defendant's claim of *right not to stand trial* on the plaintiff's allegations.'" Br. 16 (quoting *Mitchell*, 472 U.S. at 527) (emphasis added); *see also Martin*, 86 F.3d at 1396 (finding the conclusiveness requirement satisfied on this basis);

Commuter Transp. Sys., 801 F.2d at 1286 (same). Yet *Parker* provides an exemption from Sherman Act liability, not any "right not to stand trial." *Supra* pp. 20-24. An order denying a *Parker* defense thus does not definitively determine the defendant's right to be exempt from trial, because the defendant has no such right. Instead, it provisionally determines that the federal antitrust laws prohibit the alleged anti-competitive conduct. Because this issue may "'remain[ ] open, unfinished and inconclusive' until the trial court has pronounced judgment," it cannot be immediately appealed. *United States v. MacDonald*, 435 U.S. 850, 859 (1978) (quoting *Cohen*, 337 U.S. at 546; alteration omitted).

B. The District Court's Order Here Did Not Conclusively Resolve The *Parker* Issue

Even if district court denials of a *Parker* defense could generally be deemed conclusive, the particular order here cannot be. In the order, the district court did not definitively conclude that the *Parker* defense was unavailable to SRP. Instead, it determined there were "factual" questions that could not be "resolved" on a motion to dismiss. Pet. App. 67a. And in later denying SRP's Section 1292(b) motion, the court expressly stated that it "did not make a final decision on the state-action doctrine." Pet. App. 33a n.7. The tentativeness of the district court's decision is alone reason to affirm the Ninth Circuit's dismissal of SRP's appeal.

The circumstances here parallel those this Court confronted in *Swint*. There, in denying the county defendant's summary judgment motion, the district court observed that a key state official "*may have been* the final decision-maker for the" county (a potentially dispositive question). *Swint*, 514 U.S. at 42. The district court also advised the parties that they would "have an opportunity to convince th[e] Court that [this official] was or was not the final policy maker." *Id.* at 39. Because the district court's summary judgment decision was "tentative, informal or incomplete," *Swint* held it was not an appealable collateral order. *Id.* at 42; *see Cohen*, 337 U.S. at 546 ("The effect of [Section 1291] is to disallow appeal from any decision which is tentative, informal, or incomplete.").

Thus, even where a district court's order deals with an issue that may generally fall within the collateral-order exception (an analysis conducted by looking at "the class of claims, taken as a whole," *Mohawk*, 558 U.S. at 107), appellate jurisdiction exists only where the particular order also definitively resolves that issue. *See Swint*, 514 U.S. at 42; *cf. Digital Equip.*, 511 U.S. at 869 n.2 (looking at specific language of underlying order in discussing conclusiveness). After all, while this Court has given Section 1291 a "practical construction," *id.* at 867, it would be difficult to construe the statutory requirement of a "final decision" as satisfied by a decision that the district court expressly states is *not* final. Accordingly, where, as here, the district court "has expressly

held open the prospect of reconsideration, appeal is denied." 15A Wright & Miller § 3911.1.

SRP contends that *Swint* is distinguishable because the *Swint* district court was awaiting further "factual development," while here the "district court's clear-articulation ruling * * * resolved a purely legal question." Br. 18. But SRP again disregards the order from which it appealed, which concluded that the active-supervision requirement presented factual questions that remained unresolved. Pet. App. 67a; *see supra* pp. 8-10, 46-48.

Regardless, even if the district court's order had turned solely on a legal issue, it was one the court specifically stated was *not* conclusively resolved. SRP relies (Br. 10) on the district court's subsequent denial of Section 1292(b) certification, while asking this Court to ignore the district court's statement in that same order that its *Parker* decision was not "final" and that SRP was "free to raise" the issue "at summary judgment" (as SRP in fact did in its still-pending motion). Pet. App. 33a n.7. But such statements are not a matter of mere "fortuity" (*cf.* Br. 17); rather, they manifest the district court's own view that its decision was "tentative." *Swint*, 514 U.S. at 42. The district court should be taken at its word: because its rejection of SRP's *Parker* defense was not a "final decision" (Pet. App. 33a n.7), Section 1291 provides no basis for appellate jurisdiction. Any other outcome would represent the sort of "encroach[ment] upon the prerogatives of district court judges" that Section 1291 seeks to avoid. *Mohawk*, 558 U.S. at 106.

IV. THE COLLATERAL-ORDER DOCTRINE SHOULD NOT BE EXPANDED

Although SRP's request to expand the collateral-order doctrine fails under the well-established tenets of the doctrine itself, the availability of other means for seeking appellate review further counsels against expansion.

Litigants in SRP's position have alternative avenues for pursuing interlocutory appeals—avenues tailored to specific circumstances where immediate intervention is warranted. In particular, antitrust defendants can (as SRP did here) "ask the district court to certify, and the court of appeals to accept, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b)." *Mohawk*, 558 U.S. at 110. This path provides a particularly good fit for SRP's proposed subcategory of "legal" *Parker* decisions, as Section 1292(b) authorizes appeal where there is a "controlling question of law" that the court of appeals might resolve differently. 28 U.S.C. § 1292(b). It also allows the courts to assess whether "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Ibid.* Where, for example, a court of appeals' reversal would still leave additional *Parker* issues for the district court to resolve, allowing the litigation to proceed in the district court will often be more efficient. *Supra* p. 49. And putting Section 1292(b) aside, a defendant asserting a *Parker* defense may, in extraordinary circumstances, "petition the court of appeals for a writ of mandamus." *Mohawk*, 558 U.S. at 111.

Additionally, this Court may use the rulemaking process to render certain classes of orders subject to immediate appeal. 28 U.S.C. §§ 1292(e), 2072. Congress provided this Court with such authority in 1990 and 1992 amendments to the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.* This Court has recognized that Congress thus "designat[ed] rulemaking, not expansion by court decision, as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk*, 558 U.S. at 113. The Court has emphasized that the existence of this congressionally approved rulemaking process provides all the more reason to ensure that the "class of collaterally appealable orders * * * remain narrow and selective in its membership." *Ibid*; *see id.* at 115 (Thomas, J., concurring in part and concurring in the judgment) (opining that given the statute, only orders "on all fours with orders we previously have held to be appealable under the collateral order doctrine" should be recognized).

This rulemaking process has distinct advantages. It "draws on the collective experience of bench and bar, and it facilitates the adoption of measured, practical solutions." *Mohawk*, 558 U.S. at 114 (citation omitted). For example, after this Court in *Mohawk* declined to extend the collateral-order doctrine to disclosure orders adverse to the attorney-client privilege, the Advisory Committee on Appellate Rules considered "a range of options" as "possible rulemaking responses." Minutes of Spring 2010 Mtg. of Advisory Cmte. on

Appellate Rules 12 (Apr. 8 and 9, 2010).[4] Ultimately, the Committee determined that any such amendment was unwarranted because, among other things, it would be difficult to cabin the class of appealable privilege orders and could unduly burden the courts of appeals. Minutes of Fall 2014 Mtg. of Advisory Cmte. on Appellate Rules 7-8 (Oct. 20, 2014);[5] *see also Microsoft*, 137 S. Ct. at 1714 (discussing the years-long consideration and "informed assessment" that led the Advisory Committee to propose what is now Federal Rule of Civil Procedure 23(f)). If immediate appeals of SRP's proposed class of "legal" public-entity *Parker* denials are to be authorized, it should come from this sort of measured, deliberative process, not through the extension (and distortion) of the collateral-order doctrine. *Mohawk*, 558 U.S. at 114.

---

[4] *Available at* http://www.uscourts.gov/sites/default/files/fr_import/AP04-2010-min.pdf.

[5] *Available at* http://www.uscourts.gov/sites/default/files/appellate-minutes-10-2014_0.pdf.

CONCLUSION

The judgment dismissing the appeal should be affirmed.

Respectfully submitted,

RICHARD A. FEINSTEIN
BOIES, SCHILLER & FLEXNER LLP
1401 New York Ave., N.W.
Washington, D.C. 20005

STEVEN C. HOLTZMAN
KATHLEEN R. HARTNETT
SEAN P. RODRIGUEZ
BOIES, SCHILLER & FLEXNER LLP
1999 Harrison St.
Oakland, CA 94612

DEANNE E. MAYNARD
Counsel of Record
JOSEPH R. PALMORE
JEFFREY A. JAECKEL
SOPHIA M. BRILL
SETH W. LLOYD
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-8740
DMaynard@mofo.com

JAMES R. SIGEL
MORRISON & FOERSTER LLP
425 Market St.
San Francisco, CA 94105

Counsel for Respondent Tesla Energy Operations, Inc.

FEBRUARY 12, 2018

No. 17-368

IN THE

Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Petitioner,

v.

TESLA ENERGY OPERATIONS, INC., F/K/A SOLARCITY CORPORATION
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

CHRISTOPHER E. BABBITT
DANIEL S. VOLCHOK
DAVID M. LEHN
DAVID GRINGER
DANIEL WINIK
ARPIT K. GARG
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

MOLLY S. BOAST
Counsel of Record
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007
(212) 230-8800
molly.boast@wilmerhale.com

CHRISTOPHER T. CASAMASSIMA
WILMER CUTLER PICKERING HALE AND DORR LLP
350 S. Grand Ave.
Los Angeles, CA 90071
(213) 443-5300

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

A. Conclusiveness 1

B. Separateness 4

C. Effective Unreviewability 11

1. The proper standard 11

2. Applying the standard 18

D. Alternative Appeal Mechanisms 24

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Page(s)

Alden v. *Maine*, 527 U.S. 706 (1999) 20

Ashcroft v. *Iqbal*, 556 U.S. 662 (2009) 20, 23

Atlantic Richfield Co. v. *USA Petroleum Co.*, 495 U.S. 328 (1990) 6

Behrens v. *Pelletier*, 516 U.S. 299 (1996) 10

California Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) 6

Cantor v. *Detroit Edison Co.*, 428 U.S. 579 (1976) 6

City of Columbia v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991) 23

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) 12

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 3, 6, 7

Cunningham v. *Hamilton County*, 527 U.S. 198 (1999) 7

Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 9

Digital Equipment Corp. v. *Desktop Direct, Inc.*, 511 U.S. 863 (1994) 3, 13

Filarsky v. *Delia*, 566 U.S. 377 (2012) 18

FTC v. *Phoebe Putney Health System, Inc.*, 568 U.S. 216 (2013) 2, 18, 19

TABLE OF AUTHORITIES—Continued

Page(s)

FTC v. *Ticor Title Insurance Co.*, 504 U.S. 621 (1992) 19

General Oil Co. v. *Crain*, 209 U.S. 211 (1908) 20

Gulfstream Aerospace Corp. v. *Mayacamas Corp.*, 485 U.S. 271 (1988) 3

Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 23

Hartman v. *Moore*, 547 U.S. 250 (2006) 11

Hutto v. *South Carolina Retirement System*, 773 F.3d 536 (4th Cir. 2014) 11

Imbler v. *Pachtman*, 424 U.S. 409 (1976) 17

Johnson v. *Jones*, 515 U.S. 304 (1995) 3, 6, 7, 10, 11, 22

Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 2, 8, 9, 17, 20

Mohawk Industries, Inc. v. *Carpenter*, 558 U.S. 100 (2009) 3, 12, 15, 16

Mount Healthy City School District Board of Education v. *Doyle*, 429 U.S. 274 (1977) 18

NCAA v. *Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984) 8

Nixon v. *Fitzgerald*, 457 U.S. 731 (1982) 17

North Carolina State Board of Dental Examiners v. *FTC*, 135 S. Ct. 1101 (2015) 1, 8, 21

Osborn v. *Haley*, 549 U.S. 225 (2007) 14

Owen v. *City of Independence*, 445 U.S. 622 (1980) 21

Parker v. *Brown*, 317 U.S. 341 (1943) 6, 17, 18

TABLE OF AUTHORITIES—Continued

Page(s)

Plumhoff v. *Rickard*, 134 S. Ct. 2012 (2014) 11, 14

Puerto Rico Aqueduct & Sewer Authority v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 10, 11

Quern v. *Jordan*, 440 U.S. 332 (1979) 19

Richardson v. *McKnight*, 521 U.S. 399 (1997) 6

Richardson-Merrell, Inc. v. *Koller*, 472 U.S. 424 (1985) 3

Sell v. *United States*, 539 U.S. 166 (2003) 15

Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 20

Southern Motor Carriers Rate Conference, Inc. v. *United States*, 471 U.S. 48 (1985) 22

Stack v. *Boyle*, 342 U.S. 1 (1951) 14

Stump v. *Sparkman*, 435 U.S. 349 (1978) 17

Swint v. *Chambers County Commission*, 514 U.S. 35 (1995) 3, 21

United States ex rel. Lesinski v. *South Florida Water Management District*, 739 F.3d 598 (11th Cir. 2014) 11

United States v. *Williams*, 504 U.S. 36 (1992) 18

Van Cauwenberghe v. *Biard*, 486 U.S. 517 (1988) 7

Will v. *Hallock*, 546 U.S. 345 (2006) 13, 14, 15

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XI 19

28 U.S.C. §1292 24

42 U.S.C. §1983 21

OTHER AUTHORITIES

Areeda, Phillip E. & Herbert Hovenkamp, *Fundamentals of Antitrust Law* (4th ed. & 2015 Supp.) 2, 6

IN THE

Supreme Court of the United States

No. 17-368

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Petitioner,

v.

TESLA ENERGY OPERATIONS, INC., F/K/A SOLARCITY CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

ARGUMENT

A. Conclusiveness

1. Disagreeing with every circuit that has addressed the question, *see* Opening Br. ("O.B.") 16, SolarCity contends that denials of state-action immunity on legal grounds are not conclusive. Its first rationale (Br. 54) is that the immunity "depends on ... facts." The cases it cites, however, refute that claim; the analysis in each was legal. *See North Carolina State Board of Dental Examiners* v. *FTC*, 135 S. Ct. 1101, 1110-1116 (2015) (reviewing cases, state statutes, and other legal

authorities); *FTC* v. *Phoebe Putney Health System, Inc.*, 568 U.S. 216, 227-236 (2013) (examining Georgia's hospital laws).

To be sure, denials of state-action immunity (like qualified-immunity denials) *can* be fact-based, as in the litigation SolarCity recounts (Br. 54-55). But usually they are not. *See* Areeda & Hovenkamp, *Fundamentals of Antitrust Law* ¶222b (4th ed. & 2015 Supp.). And specifically, they are not fact-based when (again, as with qualified immunity) they rest on "purely legal" grounds, *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 n.9 (1985). Those denials—the class at issue here—are conclusive under this Court's precedent. O.B. 16.

SolarCity also notes (Br. 54) that state-action immunity is an affirmative defense. But the District already addressed that (O.B. 43), explaining that this Court has allowed collateral-order appeals with some affirmative defenses.

Finally, SolarCity never squarely addresses the District's central point: that, "as with denials on legal grounds of qualified immunity, a denial on such grounds of state-action immunity '... conclusively determines the defendant's claim of right not to stand trial on the plaintiff's allegations.'" O.B. 16 (quoting *Mitchell*, 472 U.S. at 527). SolarCity's response (Br. 56) is that state-action immunity does not provide "any 'right not to stand trial.'" That misdirection fails. The District's point was that, just as *Mitchell* held that a qualified-immunity denial on legal grounds "conclusively determines the defendant's claim" to that immunity, so a denial on such grounds of state-action immunity "conclusively determines the defendant's claim" to *that* immunity. O.B. 16. SolarCity ignores this, focusing on *Mitchell*'s reference to standing trial in order to divert

attention toward arguments about effective unreviewability. That does not change *Mitchell*'s rejection of SolarCity's conclusiveness arguments.

2. SolarCity alternatively contends (Br. 56) that even if denials of state-action immunity are "generally" conclusive, the denial here was not. "This Court, however, has expressly rejected efforts to reduce the finality requirement ... to a case-by-case determination[.]" *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 439 (1985); *accord Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100, 107 (2009) (citing *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 473 (1978)); *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 277 (1988); *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994); *Johnson* v. *Jones*, 515 U.S. 304, 315 (1995). Indeed, *Johnson* v. *Jones* refutes SolarCity's claim (Br. 57) that collateral-order review is available only if both the overall class of claims *and* the specific order being challenged meet the requirements. *Johnson* acknowledged that some purely legal qualified-immunity denials might not meet the separateness requirement, yet it made clear that even those orders could be immediately appealed. *See* 515 U.S. at 319.

In any event, although the district court initially "determined there were [relevant] 'factual' questions," SolarCity Br. 56, it later recognized that clear articulation raises a legal question, Pet. App. 25a. And once it held clear articulation lacking, no factual development—on either state-action-immunity prong—could change its immunity denial; its (purely legal) clear-articulation ruling by itself dictated that denial.

This point also rebuts SolarCity's claim (Br. 57) that "[t]he circumstances here parallel those ... in *Swint*" v. *Chambers County Commission*, 514 U.S. 35

(1995). There, factual development could have affected the court's pretrial ruling, because the pertinent issue there did turn on the facts. O.B. 17-18. Again, the same is not true here. That is why SolarCity cites no fact that could change the court's denial.[1]

SolarCity also invokes (Br. 58) the district court's reference to factual development regarding the active-supervision requirement. But even putting aside that that requirement can itself present a legal question, *see* O.B. 22-23, no such development, as explained, could affect the immunity denial.

Lastly, SolarCity asserts (Br. 56, 58) that the denial here is inconclusive because the district court declared it so. Even if it were relevant that one particular denial might realistically be reconsidered, however, the district court here has concluded that there are "no substantial grounds for disagreement" with its clear-articulation holding, Pet. App. 26a. More fundamentally, SolarCity's position would mean that any judge rejecting a claim of Eleventh Amendment immunity, qualified immunity, and so on could thwart this Court's precedent (and insulate herself from immediate review) simply by claiming she might revisit her denial. As noted, this Court has repeatedly rejected that position. *See supra* p.3. SolarCity never addresses this dispositive point.

B. Separateness

1.a. In denying that state-action immunity is separate from the merits of an antitrust claim, SolarCity

---

[1] *Swint* is the only decision of this Court mentioned in the treatise passage SolarCity cites (Br. 58). That passage thus does not support SolarCity's position.

first argues (Br. 40) that the "*Parker* doctrine is an interpretation of the scope of the Sherman Act."[2] State-action immunity, that is, supposedly differs from immediately appealable immunities because it is "internal" to antitrust statutes, rather than an "external" doctrine based in the Constitution, another statute, or common law. Consequently, SolarCity argues, state-action immunity, unlike "external" immunities, prevents the alleged conduct from being unlawful. This logic—which to the District's knowledge no court has adopted—lacks merit.

To begin with, state-action immunity is *not* wholly "internal." It rests on external constitutional considerations: federalism and state sovereignty. O.B. 32-35. That aside, defining "merits" as anything internal to a statute makes no sense. On that theory, there would be no collateral-order appeal even if, for example, Congress had expressly provided in the antitrust laws that states and state officers acting in their official capacity had absolute immunity against any claim under those laws, or that no action could be maintained under those laws against a defendant raising a meritorious qualified-immunity defense. Those immunities would then be "internal" and thus not separate from the merits—even though this Court has held that they are separate.

If SolarCity's response is that state-action immunity is not merely "internal" but specifically an interpretation of the antitrust laws' liability provisions (Br. 12, 21-22), that simply assumes the conclusion, i.e., assumes (Br. 41) that "[i]f *Parker* applies, ... no antitrust law is violated." And that assumption is wrong. In address-

---

[2] The government echoes SolarCity's arguments on separateness (and on effective unreviewability and alternative appeal mechanisms).

ing a challenge to a California wine-pricing system, the Court stated that the system "plainly constitutes resale price maintenance in violation of the Sherman Act.... Thus, we must consider whether the State's involvement ... establish[es] antitrust immunity under *Parker* v. *Brown*, 317 U.S. 341 (1943)." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980). *Parker* itself, of course, shows that—as the District argued (O.B. 22)—a court need not even decide whether there would be a violation absent state-action immunity; the Court there stated: "We may assume ... that the California prorate program would violate the Sherman Act if ... organized ... by ... private persons." 317 U.S. at 350.

State-action immunity therefore operates just like "external" immunities that satisfy the separateness requirement; it "frees one who enjoys it from a lawsuit whether or not he acted wrongly," *Richardson* v. *McKnight*, 521 U.S. 399, 403 (1997); *accord Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 600 (1976) (plurality). The leading treatise agrees, saying that state-action immunity "shield[s] the challenged conduct even if such conduct were ... otherwise offensive to the antitrust laws." *Fundamentals of Antitrust Law* ¶224a.

b. SolarCity next asserts that separateness is lacking even if "merits" means (as the District contends) only the "factual and legal issues comprising the plaintiff's cause of action," *Coopers & Lybrand*, 437 U.S. at 469. In antitrust actions, those issues boil down to whether the defendant engaged in injurious anti-competitive conduct. *E.g.*, *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 344 (1990). State-action immunity is separate—i.e., "conceptually distinct" and "significantly different" *Johnson*, 515 U.S. at 314—from those issues. It turns not on whether the

defendant engaged in injurious anticompetitive conduct but on whether it acted on a state's behalf. O.B. 19-23.

Disputing this, SolarCity argues (Br. 42) that separateness is lacking whenever resolving a claim "may require" any consideration of the merits. In fact, separateness is lacking only when a claim "*generally* involves considerations ... *enmeshed* in the ... issues comprising the" plaintiff's cause of action. *Coopers & Lybrand*, 437 U.S. at 469 (emphases added); *accord Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 529 (1988) (no separateness because, "*in the main*, the issues that arise in *forum non conveniens* determinations will *substantially* overlap" with the merits (emphases added)); *Johnson*, 515 U.S. at 314 (no separateness where "it will often prove difficult to find any 'separate' question"). SolarCity's authority for a may-require standard is *Cunningham* v. *Hamilton County*, 527 U.S. 198 (1999). But the sentence in *Cunningham* immediately before the one SolarCity cites explains that separateness was lacking there because, "[m]uch like the orders ... in *Van Cauwenberghe* and *Coopers & Lybrand*, a Rule 37(a) sanctions order *often will be* inextricably intertwined with the merits." *Id.* at 205 (emphasis added). SolarCity's suggestion that *Cunningham* nevertheless changed prior cases' separateness standard—even while citing those cases—is untenable, particularly given that subsequent cases also reject a may-require standard. Separateness would thus be lacking here only if state-action immunity often or generally overlapped substantially with the merits of an antitrust claim.

That is not the case—certainly not with purely legal denials, the class at issue here. SolarCity asserts (Br. 43-44) that the clear-articulation inquiry "requires examination of the [alleged] conduct ... to determine

whether ... anticompetitive consequences were" foreseeable. But that level of overlap, i.e., consideration of the factual allegations, is what *Mitchell* held insufficient to defeat separateness. O.B. 21-22 (citing 472 U.S. at 528-529). SolarCity ignores this, perhaps because such consideration was the limit of the overlap with the merits in *Phoebe Putney*, on which SolarCity relies; the analysis there mostly involved a review of Georgia's (separate) hospital laws. *See* O.B. 19-20. SolarCity also ignores the other three state-action-immunity decisions the District cited (O.B. 20) similarly illustrating the lack of overlap between the merits and the clear-articulation inquiry.

The foregoing points likewise answer SolarCity's arguments (Br. 44-45) about separateness and the active-supervision requirement. To decide whether that requirement applies, a court examines state laws addressing the defendant's nature and composition, including the nature of its electoral system, if any. *See North Carolina State Board*, 135 S. Ct. at 1110-1116 (conducting such an examination). That inquiry does not generally or substantially overlap with the merits of an antitrust claim, which turn not on the defendant's composition and nature but on the "impact on competition" of the alleged "restraint on trade," *NCAA* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85, 104 (1984). Finally, SolarCity's argument that separateness is absent when the question is whether there actually was active supervision (Br. 45) is also wrong. When such denials are purely legal, they involve only looking at whether state law provided adequate mechanisms for active supervision. *See* O.B. 22-23.

2. SolarCity's fallback separateness argument is that the relevant class of orders is *all* denials of state-

action immunity to public entities, not denials on purely legal grounds. That is meritless.

To begin with, SolarCity contends (Br. 45-46) that the District has shifted positions from its petition, which purportedly embraced SolarCity's all-denials definition. To the contrary, the petition argued that "orders denying state-action immunity to public entities *on legal grounds*" are immediately appealable. Pet. 35 (emphasis added); *accord* Pet. 31 (header), 34; Cert. Reply 7-8, 10. SolarCity points to the wording of the question presented, but that would help SolarCity only if this Court had to answer questions presented either "yes" or "no." In fact, the Court's answer could parallel its answer in the qualified-immunity context: yes, if the denial is on "purely legal" grounds, *Mitchell*, 472 U.S. at 528 n.9.

SolarCity also argues (Br. 52-53) that even purely legal denials overlap with the merits. That simply restates SolarCity's core separateness contention (which fails for the reasons given earlier); it is irrelevant to the proper class definition. Likewise immaterial is SolarCity's argument (Br. 46-48) that this case does not involve a purely legal denial. Whether a particular denial falls inside or outside the relevant class has nothing to do with the class's proper definition. In any event, the denial here *was* purely legal; again, once the district court recognized that clear articulation is a legal question, and deemed such articulation lacking, the immunity claim was defeated. Were there doubt about that, the proper course would be to answer the question presented in the way suggested above and then—because this is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)—allow the lower courts to resolve SolarCity's never-addressed case-specific arguments "on remand," *Puerto Rico Aqueduct*

& Sewer Authority v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993).

SolarCity's lone pertinent contention regarding how to define the class (Br. 48-52) is that the District's definition is "unworkable." But this Court rejected the same contention—that this definition "will prove unworkable"—in *Johnson*, 515 U.S. at 318. *Johnson* explained that "where purely legal matters are at issue," (1) appellate judges enjoy "comparative expertise," such that interlocutory appeals are more "likely to bring important error-correcting benefits"; (2) appeals generally do not "require reading a vast pretrial record," minimizing the "delay" from interlocutory appeal; and (3) there is "less risk" of courts "wast[ing] time in duplicating investigations of the same facts on successive appeals." *Id.* at 316-317. In short, "considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources" favor immediate appealability of orders involving "abstract issues of law." *Id.* at 317. This reasoning applies equally here.

SolarCity's effort to distinguish denials of qualified immunity, which *Johnson* addressed, from denials of state-action immunity is unavailing. First, SolarCity points (Br. 49) to the possibility of multiple interlocutory appeals. But that exists in qualified-immunity cases as well. *See Behrens* v. *Pelletier*, 516 U.S. 299 (1996). Second, SolarCity asserts (Br. 51) that "qualified immunity generally turns on a single legal question." The case it cites, *Johnson*, does not say that; *Johnson* says immediate appeal is available *when* the immunity claim raises a legal question, *see* 515 U.S. at 313-314. The same should be true in this context. Third, SolarCity argues (Br. 50) that appellate courts, to confirm their jurisdiction, may have to make threshold decisions

about whether a state-action-immunity denial (or the appealed component) is purely legal. That too is true with qualified immunity. *See Johnson*, 515 U.S. at 319 (contemplating courts "separat[ing] an appealed order's reviewable determination ... from its unreviewable determination"). For example, in *Plumhoff* v. *Rickard*, 134 S. Ct. 2012 (2014), this Court, to conclude that the Sixth Circuit "properly exercised jurisdiction," had to hold that the qualified-immunity denial there "raise[d] legal issues ... different from any purely factual issues that the trial court might confront if the case were tried," *id.* at 2019-2020; *see also Hartman* v. *Moore*, 547 U.S. 250, 257 n.5 (2006).

Finally, SolarCity observes (Br. 48-49) that this Court has not applied the purely-legal definition beyond the qualified-immunity context. But that definition was apparently raised in this Court in only one other context, Eleventh Amendment immunity. *See Puerto Rico Aqueduct*, 506 U.S. at 147. And "[w]hether an action is barred by the Eleventh Amendment is a question of law." *Hutto* v. *South Carolina Retirement Systems*, 773 F.3d 536, 542 (4th Cir. 2014); *accord, e.g.*, *United States ex rel. Lesinski* v. *South Florida Water Management District*, 739 F.3d 598, 602 (11th Cir. 2014). By contrast, orders denying state-action immunity are not always legal—making the distinction appropriate for purposes of assessing immediate appealability.

C. Effective Unreviewability

1. The proper standard

SolarCity's arguments regarding the standard for effective unreviewability (Br. 17-29) mischaracterize

the District's position and misunderstand relevant precedent.

a. SolarCity claims (Br. 25-26) that the District espouses a "novel[]" standard under which "any order involving an 'important interest'" qualifies. In reality, the District's position is that "[a]n order is effectively unreviewable if delaying an appeal would imperil a sufficiently important interest." O.B. 28 (header); *accord* O.B. 3, 30. Importance alone is therefore insufficient; the asserted interests must be jeopardized by deferred review.[3]

Far from being novel, that standard comes directly from this Court's cases. *Mohawk*, for example, stated that in assessing effective unreviewability, "the decisive consideration is whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" 558 U.S. at 107; *see also id.* at 108 (similar statement in describing the "crucial question"). Indeed, the Court's seminal collateral-order decision referred to rights that are "too important to be denied [immediate] review." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

b. Undaunted, SolarCity offers two proposals regarding the effective-unreviewability standard. First, it argues (*e.g.*, Br. 2, 12, 29) that an immunity from suit is required (and that state-action immunity does not qualify, instead providing only immunity from liability). Second, it contends that importance is a prerequisite on

---

[3] This argument is not an "abandon[ment]" (SolarCity Br. 24-25) of the District's position below. *Compare, e.g.*, Pet. C.A. Br. 41 *with* O.B. 3 (each quoting the same language from *Mohawk* about the effective-unreviewability standard).

top of an immunity from suit, i.e., that effective unreviewability exists only if "an immunity from suit ... *also* meets a certain threshold 'level of importance'" (Br. 26). Both arguments fail.

i. In analyzing effective unreviewability, some older collateral-order cases (on which SolarCity relies in making this argument (*e.g.*, Br. 19-20)) employed the shorthand of "immunity from suit" and "immunity from liability." *See* O.B. 28. But as litigants attempted to characterize more and more threshold grounds for dismissal as immunities from suit, the Court clarified that having the effective-unreviewability analysis actually turn on that label "is too easy to be sound and, if accepted, would leave the final order requirement ... in tatters." *Will* v. *Hallock*, 546 U.S. 345, 351 (2006); *see* O.B. 29-30. That is because "[t]here is no single, 'obviously correct way to characterize' an asserted right"; "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" *Digital Equipment*, 511 U.S. at 873. If that sufficed, "almost every [interlocutory] order might be called 'effectively unreviewable.'" *Will*, 546 U.S. at 351.

Will therefore "combed" the Court's cases "for some further characteristic that merits [immediate] appealability," *id.*—a characteristic beyond the fact that a particular right would entitle the defendant to a threshold dismissal. And it determined that, "as *Digital Equipment* explained, that something further boils down to 'a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement.'" *Id.* at 351-352. Thus, "it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively'

unreviewable if review is to be left until later." *Id.* at 353. That, again, is the standard the District espouses here.

SolarCity insists (Br. 25-26) that this recitation "misreads this Court's decisions," both because the Court has not overruled older collateral-order cases and because some recent cases (*Plumhoff* and *Osborn* v. *Haley*, 549 U.S. 225 (2007)) refer to immunity from suit. But no overruling was necessary; as *Will*'s review of precedent showed, the Court had been using *Will*'s standard all along, *see* 546 U.S. at 352, albeit with "immunity from suit" as a shorthand—one that litigants had come to abuse. *Will*, again, thus explained that "immunity from suit" is at most a label used at the conclusion of the effective-unreviewability analysis, not (as SolarCity contends) a premise of it.

As for recent cases, *Plumhoff*, in labeling qualified immunity an immunity from suit, was repeating *Mitchell*'s phrasing decades earlier, *see* 134 S. Ct. at 2019—for which *Will*'s re-examination, as explained, already accounted. And *Osborn* referred to immunity from suit because that was what this Court held the Westfall Act explicitly conferred. *See* 549 U.S. at 238-239. In that situation, courts need not judge whether sufficiently important interests are imperiled by delayed review; Congress has already done so. *See* O.B. 30 n.8. But that does nothing to support SolarCity's argument (which *Will* rejected) that those judgments can be short-circuited via the label "immunity from suit" *absent* such a legislative (or constitutional) command.

Indeed, immunity from suit has never been a prerequisite to collateral-order appeal. For example, *Stack* v. *Boyle*, 342 U.S. 1 (1951), allowed immediate appeal from orders denying bail, *id.* at 6, which involve

no such immunity. Similarly, the right asserted in *Sell* v. *United States*, 539 U.S. 166 (2003), was not an immunity from suit; as the Court noted, defendants who could not be involuntarily medicated in order to be prosecuted could still be committed civilly, *see id.* at 180. SolarCity (Br. 18) puts *Sell* in a separate category: cases involving an issue that "cannot be meaningfully addressed following final judgment." But that is just another way of saying (as *Sell* did, *see* 539 U.S. at 176-177) that the interests underlying the right would be imperiled by delayed review. It does not reconcile *Sell* (or *Stack*) with the notion that collateral-order review requires an immunity from suit. If that were true, *Mohawk* (and other cases) could have been resolved much more quickly, given the undisputed absence of any such immunity. Instead, *Mohawk*—which never even mentioned immunity from suit—undertook an extended analysis of whether the underlying interests were sufficiently important and would be lost by delayed appeal (the standard the District embraces). *See* 558 U.S. at 108-113.[4]

Put simply, SolarCity's urging of a standard that *Will* said "would leave the final order requirement ... in tatters," 546 U.S. at 351, should be rejected.

ii. Equally infirm is SolarCity's argument (Br. 24-29) that importance is a separate effective-unreviewability requirement, stacked atop the purported immunity-from-suit requirement. As explained, there is no freestanding immunity-from-suit requirement. Rather, to the extent "immunity from suit" sur-

---

[4] Cases like *Sell* also rebut SolarCity's claim (Br. 19) that absent an "explicit statutory or constitutional guarantee that trial will not occur," denial of a right is effectively unreviewable only if it is "well-grounded in 'public law.'" This Court has never so held.

vives in the doctrine, as a label drawn from early decisions, *see supra* p.14, importance—and in particular whether delayed review would threaten a sufficiently important interest—is the "decisive consideration" and "crucial question" in deciding whether that label applies, *Mohawk*, 558 U.S. at 107, 108.

SolarCity's authorities (Br. 26-29) do not support its contrary claim. They refute only the strawman argument (Br. 26) that "any order involving an 'important interest'" is effectively unreviewable. Knocking down strawmen does not show that importance is a requirement in addition to, rather than in lieu of, an immunity from suit—nor does anything else in SolarCity's discussion.

c. SolarCity's attempt to apply the immunity-from-suit/immunity-from-liability dichotomy here confirms the Court's wisdom in rejecting that dichotomy as the actual standard. First, SolarCity *declares*, repeatedly (*e.g.*, Br. 2, 21), that state-action immunity is not an immunity from suit—the very kind of conclusory declaration that led this Court to explain that such labels are at most the conclusion, not the premise, of effective-unreviewability analysis. Second, SolarCity asserts (Br. 23) that state-action immunity is an immunity from liability because it "shield[s] state-regulated *activities*," whereas immunities from suit supposedly protect "classes of government defendants." That is incorrect.

State-action immunity is both class- and activity-based—just like other immunities that fall within the collateral-order doctrine. State-action immunity covers two classes: states and non-state entities acting on a state's behalf. It thus also requires looking at activities, to determine whether a non-state defendant is in

fact acting on a state's behalf. Other immunities function the same way. Qualified immunity, for example, protects a class (public officials), but only for conduct that does not violate "clearly established law." *Mitchell*, 472 U.S. at 528. Speech-or-debate immunity similarly depends on "whether the plaintiff seeks to hold a Congressman liable for protected legislative actions or for other, unprotected conduct." *Id.* And absolute immunity likewise applies only if the defendant was engaging in particular activities. *See Nixon* v. *Fitzgerald*, 457 U.S. 731, 749 (1982) ("official acts"); *Stump* v. *Sparkman*, 435 U.S. 349, 356-357 (1978) (judicial acts); *Imbler* v. *Pachtman*, 424 U.S. 409, 431 (1976) (prosecutorial conduct).

SolarCity claims (Br. 20) that support for its class-activities distinction comes from *Parker*'s statement that the Sherman Act is "a prohibition of individual and not state action," 317 U.S. at 352. That statement, however, distinguishes between "individual ... action" and "state action," i.e., distinguishes based on the defendant's identity, *not* activity. In any event, state-action immunity (like other immunities) is, as explained, about both classes and activities. Nothing in *Parker*—or any other decision of this Court—is inconsistent with denials of the immunity being immediately appealable.

In sum, the effective-unreviewability standard is (as SolarCity eventually acknowledges (Br. 29)) exactly what this Court's recent collateral-order cases have said: whether denying immediate appeal would imperil a sufficiently important interest.

2. Applying the standard

SolarCity offers various arguments (Br. 29-39) for why effective unreviewability is absent here under the correct standard. None has merit.[5]

a. SolarCity claims (Br. 31-32) that although state-action immunity rests on the same sovereignty and governmental interests that "render qualified- and sovereign-immunity claims effectively unreviewable," collateral-order review is unwarranted here because state-action immunity "applies to defendants and remedies to which neither qualified nor sovereign immunity extend[s]." Specifically, SolarCity notes (Br. 30-32) that state-action immunity, unlike Eleventh Amendment immunity, can be invoked by non-state entities. But state-action immunity—just like state-sovereign immunity—"does not apply ... directly" to non-state entities, *Phoebe Putney*, 568 U.S. at 225. It applies if they function as the state's "agent[]," carrying out "activities directed by its legislature." *Parker*, 317 U.S. at 350-351; *cf. Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 280 (1977) (political subdivision "partak[es] of the State's Eleventh Amendment immunity" if it is "an arm of the State"); *Filarsky* v. *Delia*, 566 U.S. 377, 387 (2012) (qualified immunity extends to "private individuals engaged in public service"). When state-action immunity applies,

---

[5] In making these arguments, SolarCity reprises (Br. 32) its petition-stage contention that the District's "public status is purely 'nominal.'" That is wrong, but regardless it concerns the District's entitlement to state-action immunity, not whether denials are immediately appealable. *See* O.B. 25 n.7. It thus provides no basis to affirm—nor any basis to dismiss the writ as improvidently granted, given that the issue was raised at the petition stage, *see United States* v. *Williams*, 504 U.S. 36, 40 (1992).

therefore, it is precisely out of respect for "the sovereign capacity of the States to regulate their economies." *Phoebe Putney*, 568 U.S. at 224; *accord id.* at 226 (state-action immunity preserves states' "freedom ... to *use their municipalities* to administer state regulatory policies" (emphasis added)); *FTC* v. *Ticor Title Insurance Co.*, 504 U.S. 621, 633 (1992) ("Immunity is conferred [on private actors] out of respect for ongoing regulation by the State[.]").

Indeed, although the opening brief highlighted (at 33-34) the state-sovereignty interests jeopardized by delayed review of state-action-immunity denials—interests underscored by the amicus briefs supporting the District (including one from 24 states)—SolarCity ignores those interests, focusing on the defendants that are sued for carrying out states' economic policies. But it is the states themselves that choose how to regulate their economies. SolarCity's position would subject states to the indignity of having their policy choices inhibited via years of litigation initiated by disgruntled private actors against those effectuating the states' policies.

SolarCity also argues (Br. 30) that Eleventh Amendment and qualified immunities bar "only ... damages suits." In fact, the Eleventh Amendment bars "any suit in ... equity," U.S. Const. amend. XI, and hence precludes injunctions against states as well as retrospective equitable relief against their agents, *e.g.*, *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979). Contrary to SolarCity's argument, moreover, this Court has explained that injunctions against states and their agents implicate essentially the same interests as damages actions:

> [T]he relief sought ... is irrelevant to ... whether the suit is barred by the Eleventh Amendment.... The Eleventh Amendment does not exist solely ... to "prevent federal-court judgments that must be paid out of a State's treasury"; it also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."

Seminole Tribe v. *Florida*, 517 U.S. 44, 58 (1996) (brackets and citations omitted).

Qualified immunity is likewise concerned with not only "liability for money damages," but also "the general costs of subjecting officials to [both] the risks of trial" and "such pretrial matters as discovery," because those too cause "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell*, 472 U.S. at 526; *accord Ashcroft* v. *Iqbal*, 556 U.S. 662, 685 (2009). These costs are imposed by injunctive suits as well as damages actions.

To be sure, qualified and Eleventh Amendment immunities do not bar prospective equitable relief against state officials. But that is because their underlying interests, although present in cases requesting such relief, are outweighed by the need to provide adequate remedies for constitutional violations. As this Court put it, "certain suits for declaratory or injunctive relief against state officers must ... be permitted if the Constitution is to remain the supreme law of the land." *Alden* v. *Maine*, 527 U.S. 706, 747 (1999) (citing *General Oil Co.* v. *Crain*, 209 U.S. 211, 226-227 (1908)). In the state-action-immunity context, however, there is no constitutional imperative to provide remedies for anti-

competitive state policies, so the immunity's scope reflects the full range of situations where the underlying interests are at stake. *See* States Br. 23-31; National Governors Association Br. 8-18; American Public Power Association Br. 21-24. That the countervailing interests are weaker with state-action immunity than with other immunities provides no basis to deny collateral-order appeal here.

For similar reasons, SolarCity errs in invoking (Br. 31) *Swint*'s refusal to permit collateral-order appeal from orders denying a municipality's claim of immunity from damages under 42 U.S.C. §1983. *See* 514 U.S. at 41-43. That refusal flowed from the Court's earlier rejection of qualified immunity for municipalities under §1983, a rejection based partly on the fact that conferring qualified immunity on municipalities would undermine §1983's "central aim" of "provid[ing] protection to those persons wronged by the misuse of [government] power." *Owen* v. *City of Independence*, 445 U.S. 622, 650 (1980) (brackets and quotation marks omitted); *accord id.* at 656. Again, then, this Court deemed the governmental interests underlying qualified immunity outweighed by other interests. By contrast, the entire rationale of state-action immunity is that when the immunity applies, the balance tips the other way, i.e., the underlying sovereignty, federalism, and other governmental interests outweigh the interests underlying the antitrust laws. *See, e.g.*, *North Carolina State Board*, 135 S. Ct. at 1109-1110. In those circumstances, immediate appeal is indeed warranted—just as when those same interests outweigh other interests in the context of Eleventh Amendment or qualified immunity.

b. SolarCity's contention (Br. 33-34) that "other doctrines" protect "the interests [the District] invokes"

is belied by the preceding discussion, and by the procedural history here. The litigation has continued despite partial dismissal under the Local Government Antitrust Act, and as SolarCity says (Br. 34), the District cannot assert Eleventh Amendment or qualified immunity. Furthermore, SolarCity does not explain why the potential availability of one defense renders the denial of another effectively reviewable after final judgment. At bottom, this argument (like much of SolarCity's brief) is really an attack on state-action immunity itself. Given the "over [7]0 years of congressional acquiescence" in the doctrine, that attack should be rejected. *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 55 n.18 (1985).

c. SolarCity frets (Br. 3, 11, 34-38) that allowing collateral review here would require allowing it with many other types of orders. That concern is misplaced.

As an initial matter, SolarCity cites nothing suggesting that the consequences it darkly forecasts have materialized in either of the two circuits where collateral-order review from denials of state-action immunity has been allowed for decades. That severely undercuts SolarCity's predictions. *See Johnson*, 515 U.S. at 319.

In any event, although SolarCity contends (Br. 34-35) that reversal here would allow *private* entities to immediately appeal denials of state-action immunity, courts of appeals have distinguished such denials from denials to public entities—just as in the qualified-immunity context. Pet. 16 n.4. SolarCity does not acknowledge this, let alone explain why it fails to allay the professed concern.

Also baseless is SolarCity's argument (Br. 35-36) that if collateral-order review is available here, it would be available from any ruling "rejecting a defendant's

argument that a state law survives federal preemption." But while various types of litigants can argue against preemption, state-action immunity can be asserted—and thus its denial immediately appealed—only by a state or its agent. *See City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379-380, 382-383 (1991) (city defendant successfully asserted state-action immunity but private co-conspirator had to rely on other defenses). Most preemption cases, moreover, would not also involve the interests underlying qualified immunity, as state-action immunity does.

Finally, SolarCity contends (Br. 36) that if the "efficiency interests" the District identifies sufficed, then interlocutory appeal would be available "whenever" a public entity's motion to dismiss was denied, because those interests "are present in all suits involving public entities." State-action immunity, however—like qualified immunity—promotes efficiency not for its own sake but to encourage government *initiative* in policymaking. O.B. 36-39. Immediate appeal is therefore available only when an asserted right is designed to protect those interests, *see Iqbal*, 556 U.S. at 685, *quoted in* SolarCity Br. 38, not anytime a defense asserted by a governmental actor is rejected. SolarCity's citations to *Swint* and *Will* (Br. 36-37) are unavailing for the same reason: As SolarCity recognizes (Br. 37), no such right was asserted there, *see* O.B. 42. Similarly, it is irrelevant that qualified immunity applies only when the law was not clearly established (SolarCity Br. 37), because that limitation does not exist to promote initiative. It instead reflects a "balancing of competing values"—avoiding the "costs" of litigation while preventing and remedying unlawful actions, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982).

D. Alternative Appeal Mechanisms

SolarCity argues (Br. 1, 59) that collateral-order appeal is unnecessary here because defendants who are denied state-action immunity can seek mandamus or certification under 28 U.S.C. §1292(b). That argument fails.

Unlike collateral-order appeal, mandamus and (as this case illustrates) §1292(b) appeal are discretionary; an appeal proceeds only if the court finds certain preconditions met. They are thus not a substitute for collateral-order appeal of right. Precedent confirms this: As the District explained (O.B. 44), mandamus and §1292(b) appeal are available for other orders this Court has held immediately appealable. Yet the Court did not regard those alternatives as a reason to deny collateral-order appeal. SolarCity offers no response.

SolarCity's final argument (Br. 60-61) is that this Court should affirm because it has rulemaking authority to permit collateral-order appeals. But the District addressed that too (O.B. 44-45), explaining that since Congress granted that authority, the Court has continued to use adjudication to approve immediate appeal for certain orders—an approach consistent with the relevant statutory text, which nowhere makes the rulemaking authority exclusive. Here too, SolarCity ignores that point.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHRISTOPHER E. BABBITT
DANIEL S. VOLCHOK
DAVID M. LEHN
DAVID GRINGER
DANIEL WINIK
ARPIT K. GARG
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

MOLLY S. BOAST
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007
(212) 230-8800
molly.boast@wilmerhale.com

CHRISTOPHER T. CASAMASSIMA
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 S. Grand Ave.
Los Angeles, CA 90071
(213) 443-5300

MARCH 2018

No. 17-368

In the Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, PETITIONER

v.

TESLA ENERGY OPERATIONS, INC., FKA SOLARCITY CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
MAKAN DELRAHIM
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ANDREW C. FINCH
Principal Deputy Assistant Attorney General
FREDERICK LIU
Assistant to the Solicitor General
KRISTEN C. LIMARZI
ROBERT B. NICHOLSON
STEVEN J. MINTZ
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

DAVID C. SHONKA
Acting General Counsel
Federal Trade Commission
Washington, D.C. 20580

QUESTION PRESENTED

Whether a public entity has the right to an immediate appeal under the collateral-order doctrine from a district court's determination that the entity's conduct is not state action beyond the reach of the Sherman Act, 15 U.S.C. 1 *et seq.*

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 10
Argument:
An order determining that the conduct of a public entity is not state action beyond the reach of the Sherman Act does not qualify for immediate appeal under the collateral-order doctrine 12
A. The collateral-order doctrine is limited to a narrow class of orders 13
B. Whether a defendant's conduct is state action beyond the reach of the Sherman Act is not an issue completely separate from the merits of a Sherman Act claim 16
C. An order determining that the conduct of a public entity is not state action is not effectively unreviewable on appeal from a final judgment 22
Conclusion 33
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 (1977) 16, 25
Ball v. *James*, 451 U.S. 355 (1981) 5
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 31
California Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) 4, 18
Cantor v. *Detroit Edison Co.*, 428 U.S. 579 (1976) 18
Catlin v. *United States*, 324 U.S. 229 (1945) 13

Cases—Continued: Page

City of Columbia v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991) 17, 25
City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978) 18
Cobbledick v. *United States*, 309 U.S. 323 (1940) 13
Cohen v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) 13, 14, 16, 20
Community Commc'ns Co. v. *City of Boulder*, 455 U.S. 40 (1982) 17
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 20
Cunningham v. *Hamilton Cnty.*, 527 U.S. 198 (1999) 15
Digital Equip. Corp. v. *Desktop Direct, Inc.*, 511 U.S. 863 (1994) 13, 15, 23, 27
FTC v. *Phoebe Putney Health Sys., Inc.*, 568 U.S. 216 (2013) 4, 5, 19, 21, 29
FTC v. *Ticor Title Ins. Co.*, 504 U.S. 621 (1992) 4
Flanagan v. *United States*, 465 U.S. 259 (1984) 14, 15, 26
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975) ... 17, 18
Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 30
Helstoski v. *Meanor*, 442 U.S. 500 (1979) 25
Hoover v. *Ronwin*, 466 U.S. 558 (1984) 3
Johnson v. *Jones*, 515 U.S. 304 (1995) 20, 22
Lauro Lines v. *Chasser*, 490 U.S. 495 (1989) 22, 23, 27
Midland Asphalt Corp. v. *United States*, 489 U.S. 794 (1989) 24
Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 16, 19, 25
Mohawk Indus., Inc. v. *Carpenter*, 558 U.S. 100 (2009) ..... *passim*
Moses H. Cone Mem'l Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983) 16
New Motor Vehicle Bd. v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978) 2, 17

Cases—Continued: Page

Nixon v. *Fitzgerald*, 457 U.S. 731 (1982) 25
North Carolina State Bd. of Dental Exam'rs v. *FTC*, 135 S. Ct. 1101 (2015) ..... *passim*
Northern Pac. Ry. Co. v. *United States*, 356 U.S. 1 (1958) 2
Osborn v. *Haley*, 549 U.S. 225 (2007) 25
Parker v. *Brown*, 317 U.S. 341 (1943) 2, 11, 16, 17
Patrick v. *Burget*, 486 U.S. 94 (1988) 4, 5, 17
Puerto Rico Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 18, 25, 29, 30
Richardson-Merrell Inc. v. *Koller*, 472 U.S. 424 (1985) 14, 23, 24
Southern Motor Carriers Rate Conference, Inc. v. *United States*, 471 U.S. 48 (1985) 3, 17, 19, 23, 25, 28
Stringfellow v. *Concerned Neighbors in Action*, 480 U.S. 370 (1987) 14, 15, 20
Swint v. *Chambers Cnty. Comm'n*, 514 U.S. 35 (1995) 13, 15, 23, 24
324 Liquor Corp. v. *Duffy*, 479 U.S. 335 (1987) 19
Town of Hallie v. *City of Eau Claire*, 471 U.S. 34 (1985) 18
Van Cauwenberghe v. *Biard*, 486 U.S. 517 (1988) 14, 22, 25
West Virginia v. *United States*, 479 U.S. 305 (1987) 19, 30
Will v. *Hallock*, 546 U.S. 345 (2006) ..... *passim*
Will v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989) 30

Constitution and statutes: Page

U.S. Const.:
Art. I, § 6, Cl. 1 (Speech or Debate Clause) 25
Amend. V (Double Jeopardy Clause) 25
Amend. VI 26
Amend. XI 12, 18, 25, 27, 29, 30
Clayton Act, 15 U.S.C. 14 (§ 3) 6
Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. 2679 25
Federal Tort Claims Act, 28 U.S.C. 2676 ..... 27, 31
Judiciary Act, ch. 20, 1 Stat. 73 (1789):
§§ 21-22, 1 Stat. 83-85 13
§ 25, 1 Stat. 85-87 13
Local Government Antitrust Act of 1984, 15 U.S.C. 34 *et seq.* 7
15 U.S.C. 35 32
15 U.S.C. 36 32
15 U.S.C. 37(b) 32
Sherman Act, 15 U.S.C. 1 *et seq.* 1
15 U.S.C. 1 ..... 2, 6, 8, 1a
15 U.S.C. 2 ..... 2, 6, 8, 1a
28 U.S.C. 1291 ..... 8, 10, 13, 32, 2a
28 U.S.C. 1292(b) 8, 15, 24
28 U.S.C. 1292(e) 15
28 U.S.C. 2072(c) 15

Miscellaneous:

15A Charles Alan Wright et al., *Federal Practice and Procedure* (2d ed. 1992) 19

In the Supreme Court of the United States

No. 17-368

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, PETITIONER

v.

TESLA ENERGY OPERATIONS, INC., FKA SOLARCITY CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether the collateral-order doctrine permits immediate appeal of a district court's determination that the conduct of a public entity is not state action beyond the reach of the Sherman Act, 15 U.S.C. 1 *et seq.* The Department of Justice and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws and a strong interest in their correct application. As the Nation's most frequent litigator in federal court, the United States also has a strong interest in the correct application of the collateral-order doctrine. The United States, through the Department of Justice, filed an amicus brief supporting respondent in the court of appeals.

STATEMENT

1. "Federal antitrust law is a central safeguard for the Nation's free market structures." *North Carolina State Bd. of Dental Exam'rs* v. *FTC*, 135 S. Ct. 1101, 1109 (2015). "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958). Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. 1. Section 2 makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." 15 U.S.C. 2.

In *Parker* v. *Brown*, 317 U.S. 341 (1943), this Court considered whether "the Sherman Act prohibits" a State from engaging in anticompetitive activity. *Id.* at 352. The Court began from the premise that an intent to restrain the acts of States as "sovereign[s]" should not be "lightly * * * attributed to Congress." *Id.* at 351. The Court found that neither the text nor the history of the Sherman Act suggested such an intent. *Id.* at 350-351. The Court held that "the Sherman Act did not undertake to prohibit," *id.* at 352, an agricultural marketing program adopted pursuant to a California state statute, *id.* at 346.

Since *Parker*, this Court has often reaffirmed that "'state action'" lies "outside the reach of the antitrust laws." *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (citation omitted). It has described this "state action doctrine" as an "implied ex-

emption to the antitrust laws," *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 55 n.18 (1985), which is "disfavored, much as are repeals by implication," *Dental Exam'rs*, 135 S. Ct. at 1110 (citations omitted). The Court has explained that the "*Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." *Southern Motor Carriers*, 471 U.S. at 56.

Subsequent decisions of this Court have clarified the scope of the state-action doctrine. Because the doctrine rests on the assumption that Congress did not intend to restrain *state* action, it applies only when "the actions in question are an exercise of the State's sovereign power." *Dental Exam'rs*, 135 S. Ct. at 1110. That requirement is satisfied when the actions in question are those of a state legislature or state supreme court, "acting legislatively rather than judicially." *Ibid.* (citation omitted).[1]

To implement their policies, States often rely on non-sovereign actors, including substate public entities (like municipalities) and private businesses or individuals. See *Dental Exam'rs*, 135 S. Ct. at 1110-1111 (observing that a State may "delegate[] control over a market to a non-sovereign actor," *i.e.*, "one whose conduct does not automatically qualify as that of the sovereign State itself"). Those policies could be frustrated if the federal antitrust laws were construed to forbid the conduct of those who carry out the State's will. See *Southern Mo-*

---

[1] The Court has reserved the question "whether the Governor of a State stands in the same position * * * for purposes of the state-action doctrine." *Hoover* v. *Ronwin*, 466 U.S. 558, 568 n.17 (1984).

tor Carriers, 471 U.S. at 56-57. The state-action doctrine thus treats the federal antitrust laws as inapplicable to nonsovereign actors when their conduct is "truly the product of state regulation." *Patrick* v. *Burget*, 486 U.S. 94, 100 (1988). To satisfy that standard, the conduct of a nonsovereign actor generally must (1) be taken pursuant to a "clearly articulated and affirmatively expressed * * * state policy" to displace competition and (2) be "actively supervised by the State itself." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citation and internal quotation marks omitted).

Both parts of the *Midcal* test are "directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). The first requirement—clear articulation—ensures that the State has "foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *FTC* v. *Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 229 (2013). But even when that requirement is satisfied, a state policy may "be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated." *Dental Exam'rs*, 135 S. Ct. at 1112. "Entities purporting to act under state authority" therefore may "diverge from the State's considered definition of the public good" even when they act within the scope of their delegated powers. *Ibid.* The second requirement—active supervision—seeks to bridge that gap "between a state policy and its implementation" by demanding that "'state officials have and exercise power to review particular anticompetitive acts * * * and disapprove those that fail to

accord with state policy.'" *Ibid.* (quoting *Patrick*, 486 U.S. at 101).

The Court has recognized "instances in which an actor can be excused from *Midcal*'s active supervision requirement." *Dental Exam'rs*, 135 S. Ct. at 1112. Although the state-action doctrine does not apply "directly" to municipalities and other political subdivisions, which "are not themselves sovereign," *Phoebe Putney*, 568 U.S. at 225, such local governmental entities "are not subject to the 'active state supervision requirement' because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies," *id.* at 226 (citation omitted). The "active supervision test" remains an "essential prerequisite," however, for "any nonsovereign entity—public or private—controlled by active market participants." *Dental Exam'rs*, 135 S. Ct. at 1113.[2]

2. Petitioner Salt River Project Agricultural Improvement and Power District was formed as a "special public water district[]" under Arizona law in 1937. *Ball* v. *James*, 451 U.S. 355, 358 (1981); see *id.* at 359. Petitioner delivers water to landowners throughout central Arizona and subsidizes those operations by selling power as an electric utility. *Id.* at 357; J.A. 12. Petitioner is "the only supplier of traditional electrical power" in the Phoenix metropolitan area, Pet. App. 3a,

---

[2] That rule reflects this Court's recognition that, when "a State empowers a group of active market participants to decide who can participate in its market," there is a "structural risk" that they will pursue "their own interests" instead of "the State's policy goals." *Dental Exam'rs*, 135 S. Ct. at 1114. Active supervision of such entities by state officials is necessary to ensure that the entity's anticompetitive conduct "result[s] from procedures that suffice to make it the State's own." *Id.* at 1111.

where it has nearly a million customers, Pet. Br. 6; J.A. 12.

Respondent SolarCity Corporation (recently renamed Tesla Energy Operations, Inc.) sells and leases rooftop solar-energy systems to homes and businesses. J.A. 8. Those systems allow respondent's customers to generate their own electricity, reducing the amount they need to purchase from utilities. *Ibid.* Respondent has thousands of customers in the Phoenix metropolitan area. J.A. 12.

In 2015, petitioner promulgated new rate plans for self-generating customers—customers who purchase some of their electricity from petitioner but who also rely on self-generation methods, like solar-energy systems. J.A. 10, 30-32. The new plans imposed greater fees on self-generating customers. J.A. 33. Respondent has alleged that the electric-utility bills for a "typical" home with a solar-energy system could increase by about $600 per year, or 65%. J.A. 32. After petitioner announced the new rate plans, J.A. 28, the number of applications respondent received for solar-energy systems in petitioner's service area allegedly fell from about 500 applications per month to 19, J.A. 35, 39-40.

3. Respondent sued petitioner in federal district court, alleging violations of Sections 1 and 2 of the Sherman Act. J.A. 7, 49-52.[3] Respondent alleged that petitioner's new rate plans imposed a "penalty" on self-generation so "significant" that consumers would have

---

[3] Respondent also brought claims under Section 3 of the Clayton Act, 15 U.S.C. 14; under state antitrust law; and under state tort law. J.A. 52-59. The district court dismissed the Clayton Act claim, Pet. App. 57a-58a, but allowed all but one of the state-law claims to proceed, *id.* at 56a-57a, 60a-64a. The court's rulings on those claims and on petitioner's accompanying defenses are not at issue here.

"no choice but to buy all their electricity from [petitioner]," thereby "exclud[ing] competition and unlawfully maintain[ing] [petitioner's] monopoly over the retail sale of electricity" in petitioner's service area. J.A. 8, 10-11. Alleging the loss of "substantial" profits "as a result of [petitioner's] anticompetitive conduct," J.A. 39, respondent sought treble damages and injunctive relief, J.A. 59.

Petitioner moved to dismiss the complaint. D. Ct. Doc. 53 (June 23, 2015). Petitioner argued that respondent had failed to adequately plead antitrust injury, a relevant product market, an illegal agreement, and anticompetitive conduct, *id.* at 18-28, and that the Local Government Antitrust Act of 1984 (LGAA), 15 U.S.C. 34 *et seq.*, precluded any award of antitrust damages, D. Ct. Doc. 53, at 6-7. Petitioner also contended that the state-action doctrine warranted dismissal. *Id.* at 9-16. It argued that Arizona had a "clearly articulated" policy to displace competition in the retail sale of electricity and that, as a local governmental entity, it was not required to show that its conduct was "actively supervised" by the State. *Id.* at 10 & n.14.

The district court granted petitioner's motion in part. Pet. App. 37a-69a. The court declined to find the state-action doctrine applicable, explaining that whether "Arizona has articulated a clear policy permitting anticompetitive conduct" and whether it "has 'actively supervised' a state regulatory policy" are "factual" questions that are "inappropriately resolved in the context of a motion to dismiss." *Id.* at 67a (citation omitted). The court viewed respondent's allegations that "Arizona has a policy permitting competition in the relevant market," and that petitioner "operates without supervision," as "all that is necessary at this stage." *Ibid.*

The district court determined, however, that as "a political subdivision of the state," petitioner was shielded by the LGAA from respondent's claims for antitrust damages. Pet. App. 64a-65a. The court also dismissed respondent's Section 1 claim for failure to adequately plead an unreasonable restraint on trade. *Id.* at 56a-60a & n.4. The court allowed respondent's Section 2 claims to proceed, finding that the complaint had "plausibly allege[d] anticompetitive conduct by an alleged monopolist." *Id.* at 62a.

Petitioner filed a notice of appeal, arguing that the district court's ruling on the state-action doctrine was "an immediately appealable collateral order" under 28 U.S.C. 1291. D. Ct. Doc. 81, at 1 (Nov. 20, 2015); see D. Ct. Doc. 82, at 1 (Nov. 20, 2015). On the same day, petitioner filed a motion asking the court to certify its order for interlocutory appeal under 28 U.S.C. 1292(b). D. Ct. Doc. 82, at 1.

The district court denied the motion for certification. Pet. App. 21a-35a. The court determined that, in ruling on petitioner's motion to dismiss, it had erred in treating application of the clear-articulation requirement as a question of fact. *Id.* at 25a. It concluded that application of that requirement is instead a "controlling question of law," satisfying one of the conditions for certification under Section 1292(b). *Id.* at 24a.

The district court explained, however, that "had [it] reached the issue as a matter of law, it would have concluded that Arizona does not have a clearly articulated policy to displace competition in the retail electricity market." Pet. App. 27a. Concluding that petitioner had "failed to demonstrate a substantial ground for difference of opinion" on the issue, *id.* at 24a-25a, the court declined to certify it for a Section 1292(b) appeal, *id.* at

27a. The court noted, however, that petitioner "is free to raise [the state-action doctrine] at summary judgment." *Id.* at 33a n.7.

4. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. Pet. App. 1a-17a.

The court of appeals observed that it has "jurisdiction over appeals from 'final decisions' of district courts," and that a "'final decision' is typically one 'by which a district court disassociates itself from a case.'" Pet. App. 4a (citations omitted). The court explained, however, that "a piece of the case may become effectively 'final' under the collateral-order doctrine, even though the case as a whole has not ended." *Id.* at 5a. Emphasizing that the collateral-order doctrine "must remain a narrow exception," the court explained that three requirements must be satisfied for an otherwise nonfinal order to be immediately appealable: (1) the order must be "conclusive"; (2) "the order must address a question that is 'separate from the merits' of the underlying case"; and (3) "the separate question must raise 'some particular value of a high order' and evade effective review if not considered immediately." *Ibid.* (citations omitted).

The court of appeals held that the district court's state-action ruling was not immediately appealable because it did not satisfy the third requirement. Pet. App. 7a-11a & n.4. The court acknowledged that "interlocutory denials of certain particularly important immunities from suit" may be immediately appealed. *Id.* at 7a. It found that principle inapplicable here, however, because "the state-action doctrine is a defense to liability, not immunity from suit." *Id.* at 8a.

The court of appeals explained that this Court in *Parker* had "recognize[d] a limit on liability under the

Sherman Act rather than a safeguard of state sovereign immunity." Pet. App. 9a. The court of appeals also observed that, "[u]nlike immunity from suit, immunity from liability can be protected by a post-judgment appeal." *Id.* at 8a. Based on its conclusion that "an interlocutory appeal is not necessary to guarantee meaningful appellate review of an order denying state-action immunity," *id.* at 11a n.4, the court dismissed petitioner's appeal without addressing the two other requirements of the collateral-order doctrine, see *id.* at 11a & n.4.

SUMMARY OF ARGUMENT

A public entity has no right under the collateral-order doctrine to appeal a district court's interlocutory determination that the entity's conduct is not state action beyond the reach of the Sherman Act.

A. Under 28 U.S.C. 1291, the courts of appeals have jurisdiction over "final decisions" of the district courts, except where direct review in this Court is available. Although a "final decision[]" typically is one that ends the litigation, the Court has construed that term in Section 1291 to encompass a narrow class of collateral orders that do not have that effect. To be immediately appealable under the collateral-order doctrine, an order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will* v. *Hallock*, 546 U.S. 345, 349 (2006) (citations omitted; brackets in original). The Court has emphasized that those requirements should be applied stringently, lest the collateral-order doctrine "swallow the general rule that a party is entitled to a single appeal" after final judgment. *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009) (citation omitted).

B. An order determining that the conduct of a public entity is not state action beyond the reach of the Sherman Act does not satisfy the second or third requirement of the collateral-order doctrine. Far from resolving an issue completely separate from the merits, a determination whether the defendant's conduct is attributable to the State is itself a merits ruling. When a defendant's conduct qualifies as state action, the Sherman Act does not "prohibit" it. *Parker* v. *Brown*, 317 U.S. 341, 352 (1943). Because the state-action doctrine reflects the Court's understanding of the Sherman Act's substantive reach, a state-action determination goes directly to the merits of the Sherman Act claim.

In arguing that a state-action determination is separate from the merits, petitioner assumes (Br. 19) that the "merits" of a Sherman Act claim consist only of whether the defendant has engaged in "anticompetitive conduct," *i.e.*, conduct that would violate the Sherman Act if the State had not authorized it. That assumption is unfounded. But even under that truncated view of the "merits" of a Sherman Act claim, petitioner would not be entitled to an immediate appeal of the district court's state-action ruling, since the determination whether a defendant's conduct is attributable to the State is intertwined with the determination whether the defendant's conduct is anticompetitive.

C. A state-action determination is not effectively unreviewable on appeal from a final judgment. In order to protect "the States' power to regulate," the state-action doctrine treats the Sherman Act as inapplicable to conduct that is attributable to the State itself. *North Carolina State Bd. of Dental Exam'rs* v. *FTC*, 135 S. Ct. 1101, 1109 (2015). Where it applies, the state-action doctrine ensures that conduct satisfying the doctrine's

requirements will not be treated as a Sherman Act violation. Defenses to liability, as distinguished from immunities from suit, are fully vindicable on appeal from final judgment. Delaying review thus would not "imperil a substantial public interest" protected by the state-action doctrine. *Mohawk Indus.*, 558 U.S. at 107 (citation omitted).

Petitioner contends (Br. 31-39) that, at least when the defendant is a public entity, the state-action doctrine protects the same interests as Eleventh Amendment immunity and qualified immunity. But the doctrine does not reflect any special concern for public entities as such. And while petitioner is a public entity, it is not a sovereign and is not entitled to Eleventh Amendment immunity. The purpose of the state-action doctrine is not to respect a sovereign's dignity (as in the case of the Eleventh Amendment) or to preserve initiative (as in the case of qualified immunity), but to protect the State's regulatory prerogatives. That interest is not imperiled by the absence of immediate review.

ARGUMENT

AN ORDER DETERMINING THAT THE CONDUCT OF A PUBLIC ENTITY IS NOT STATE ACTION BEYOND THE REACH OF THE SHERMAN ACT DOES NOT QUALIFY FOR IMMEDIATE APPEAL UNDER THE COLLATERAL-ORDER DOCTRINE

An order determining that a public entity's conduct is not state action for purposes of the federal antitrust laws does not satisfy two of the requirements of the collateral-order doctrine. It does not resolve an issue completely separate from the merits, and it is not effectively unreviewable on appeal from a final judgment.

The court of appeals correctly held that it lacked jurisdiction over petitioner's appeal in this case.[4]

A. The Collateral-Order Doctrine Is Limited To A Narrow Class Of Orders

"Finality as a condition of review is an historic characteristic of federal appellate procedure," dating to the first Judiciary Act, ch. 20, §§ 21-22, 25, 1 Stat. 83-87 (1789). *Cobbledick* v. *United States*, 309 U.S. 323, 324 (1940). Today, that requirement is codified in 28 U.S.C. 1291, which provides: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court." *Ibid.* "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). It is "typically" the decision "'by which a district court disassociates itself from a case.'" *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Swint* v. *Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995)).

This Court, however, has "long given" Section 1291 a "practical rather than a technical construction." *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). The Court has held that "the statute entitles a party to appeal * * * from a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as 'final.'" *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (citation and internal

---

[4] The United States takes no position on whether the first requirement of the collateral-order doctrine is satisfied here.

quotation marks omitted). That "small class" encompasses decisions that "finally determine claims of right separable from, and collateral to, rights asserted in the action." *Cohen*, 337 U.S. at 546.

The Court has applied a three-part test to determine whether a "category" of orders is immediately appealable under the collateral-order doctrine. *Mohawk Indus.*, 558 U.S. at 107 (citation omitted); see *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 529 (1988) ("In fashioning a rule of appealability under § 1291, * * * we look to categories of cases, not to particular injustices."). To be immediately appealable, an order that does not terminate the litigation must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will* v. *Hallock*, 546 U.S. 345, 349 (2006) (citations omitted; brackets in original). The "party seeking appeal must show that all three requirements are satisfied." *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987).

The Court has treated those requirements as "'stringent,'" to ensure that the collateral-order doctrine does not "overpower the substantial finality interests § 1291 is meant to further." *Will*, 546 U.S. at 349-350 (citation omitted). The general rule that only final judgments are appealable "promotes efficient judicial administration" by "avoid[ing] the delay that inherently accompanies" piecemeal appellate review. *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 430, 434 (1985). It "reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals," *Flanagan* v. *United States*, 465 U.S. 259, 264 (1984), and avoids "burden[ing] appellate courts"

with "immediate consideration of issues that may become moot or irrelevant by the end of trial," *Stringfellow*, 480 U.S. at 380. It also "helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the prejudgment stages of litigation." *Flanagan*, 465 U.S. at 263-264. For these reasons, the Court has stressed that the collateral-order doctrine "must 'never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.'" *Mohawk Indus.*, 558 U.S. at 106 (quoting *Digital Equip.*, 511 U.S. at 868).

In restricting the collateral-order doctrine to a narrow class of decisions, the Court has also noted the existence of "potential avenues of review apart from collateral order appeal." *Mohawk Indus.*, 558 U.S. at 110. Under 28 U.S.C. 1292(b), "a party may ask the district court to certify, and the court of appeals to accept, an interlocutory appeal" when certain requirements are met. *Mohawk Indus.*, 558 U.S. at 110. Alternatively, a "party may petition the court of appeals for a writ of mandamus" in "extraordinary circumstances." *Id.* at 111. And Congress through legislation—or this Court through rulemaking—can "expand the list of orders appealable on an interlocutory basis." *Swint*, 514 U.S. at 48; see *Cunningham* v. *Hamilton Cnty.*, 527 U.S. 198, 210 (1999) ("Congress may amend the Judicial Code to provide explicitly for immediate review of [nonfinal] orders."); see also 28 U.S.C. 1292(e), 2072(c) (authorizing this Court to prescribe rules designating certain orders as immediately appealable). Congress thus has "designate[d] rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when

prejudgment orders should be immediately appealable." *Mohawk Indus.*, 558 U.S. at 113 (citation omitted). Accordingly, the Court has "not mentioned applying the collateral order doctrine recently without emphasizing its modest scope." *Will*, 546 U.S. at 350.

B. Whether A Defendant's Conduct Is State Action Beyond The Reach Of The Sherman Act Is Not An Issue Completely Separate From The Merits Of A Sherman Act Claim

1. As its name suggests, the collateral-order doctrine applies only to orders that are "collateral to" the "rights asserted in the action." *Cohen*, 337 U.S. at 546. To fall within that category, an order must "resolve an important issue completely separate from the merits of the action." *Will*, 546 U.S. at 349 (citations omitted). That requirement is "a distillation of the principle that there should not be piecemeal review of 'steps towards final judgment in which they will merge.'" *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 12 n.13 (1983) (quoting *Cohen*, 337 U.S. at 546).

An order determining that an antitrust defendant's conduct is not state action does not satisfy that requirement. In a suit brought under the Sherman Act, the question on the merits is whether the defendant has engaged in conduct that the Sherman Act prohibits. Cf. *Mitchell* v. *Forsyth*, 472 U.S. 511, 529 n.10 (1985) (distinguishing question of qualified immunity from "the 'merits' of the plaintiff's claim that the defendant's actions were in fact unlawful"); *Abney* v. *United States*, 431 U.S. 651, 659 (1977) (explaining that a criminal defendant's double-jeopardy claim "is collateral to, and separable from," the determination "whether or not the accused is guilty of the offense charged"). That is precisely the question that the state-action doctrine addresses. See *Parker* v.

Brown, 317 U.S. 341, 352 (1943). The Court in *Parker* "assume[d]" that "Congress could, in the exercise of its commerce power, prohibit a state from maintaining a [price] stabilization program" like the one at issue in that case. *Id.* at 350. As a matter of statutory interpretation, however, the Court held that "the Sherman Act did not undertake to prohibit" such "an act of government." *Id.* at 352.

The state-action doctrine thus reflects the Court's understanding of the Sherman Act's substantive reach. Conduct that is attributable to a State under this Court's state-action precedents does not violate the Sherman Act. Far from being "completely separate from the merits of the action," *Will*, 546 U.S. at 349 (citations omitted), a state-action determination therefore *is* a merits determination.

The Court's decisions since *Parker* confirm that understanding. The Court has consistently framed the state-action inquiry in terms of whether the Sherman Act "prohibits" the defendant's conduct. *Patrick* v. *Burget*, 486 U.S. 94, 99 (1988); see, *e.g.*, *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 374 (1991) ("prohibit"); *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 55 (1985) ("prohibit"); *Community Commc'ns Co.* v. *City of Boulder*, 455 U.S. 40, 48 (1982) ("prohibited"). The Court has described the state-action doctrine as an "implied exemption" to the Sherman Act, *Southern Motor Carriers*, 471 U.S. at 55 n.18, with "state action" lying "outside the reach of" the statute, *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (citation omitted); see *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 791-792 (1975) (concluding that, because the state-action doctrine did not apply, the defendant's conduct

was not "beyond the reach of the Sherman Act"). And the Court has equated a determination that the state-action doctrine applies with a determination that the defendant's conduct "did not violate the Sherman Act." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 589 (1976) (plurality opinion); see *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 104 (1980) ("not violate"); *Goldfarb*, 421 U.S. at 788 ("not a violation").

Although the Court has also referred to the state-action doctrine as an "immunity," *e.g.*, *Midcal*, 445 U.S. at 105, its use of that word should not be read to suggest that the doctrine is separate from the merits of a Sherman Act claim. In describing the doctrine, the Court has used the words "immunity" and "exemption" interchangeably, often in the same opinion. *E.g.*, *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 36 (1985) ("state action exemption"); *id.* at 39 ("*Parker* immunity"); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (plurality opinion) ("*Parker* 'exemption'" and "*Parker* immunity"). And the word "exemption" is simply "shorthand" for "*Parker*'s holding that the Sherman Act was not intended by Congress to prohibit the anticompetitive restraints imposed by California in that case." *Lafayette*, 435 U.S. at 393 n.8.

The state-action doctrine is thus significantly different from other doctrines the Court has referred to as "immunities." A determination that a State has Eleventh Amendment immunity from a particular private suit, for example, does not resolve the question whether the challenged state conduct violated the applicable law. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993) (explaining that the "resolution" of whether a State is entitled to Eleventh

Amendment immunity "generally will have no bearing on the merits of the underlying action"). And while a determination that an official has qualified immunity from a particular damages claim entails a determination that there was no violation of "clearly established" law, it "does not entail a determination of the 'merits' of the plaintiff's claim that the defendant's actions were in fact unlawful." *Mitchell*, 472 U.S. at 529 n.10. In those contexts, a defendant can be immune from suit even though its conduct was unlawful. By contrast, when an antitrust defendant's conduct is found to be state action, the Sherman Act "does not apply" at all. *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 343 (1987); see 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.10, at 694 (2d ed. 1992) (concluding that the state-action doctrine does not establish an immunity from suit because "there is little to distinguish [it] from many other defenses to antitrust or other claims").

The Court's application of the state-action doctrine to federal-government suits confirms that understanding. This Court has long recognized that "States have no sovereign immunity as against the Federal Government." *West Virginia* v. *United States*, 479 U.S. 305, 311 (1987). But the Court has repeatedly applied the state-action doctrine in proceedings commenced by the federal government. See, *e.g.*, *North Carolina State Bd. of Dental Exam'rs* v. *FTC*, 135 S. Ct. 1101, 1108-1109 (2015); *FTC* v. *Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 222 (2013); *Southern Motor Carriers*, 471 U.S. at 52-53. That approach reflects the Court's recognition that the state-action doctrine is a limit on the substantive coverage of the federal antitrust laws, not an immunity from suit.

Permitting immediate review of each state-action determination therefore would risk multiple appeals on the merits in a single case. There could even be multiple pretrial appeals if, for instance, a district court determined that the clear-articulation requirement was not satisfied, was reversed, and then determined on remand that the active-supervision requirement was not satisfied, prompting a second collateral-order appeal. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 474 (1978) (noting the "potential for multiple appeals" when a district court is reversed on one ground and then relies on a different ground on remand to reach the same result). And because a state-action determination is but a "step toward final disposition of the merits," *Cohen*, 337 U.S. at 546, permitting appellate review of each such determination would risk "burden[ing] appellate courts" with "immediate consideration of issues that may become moot or irrelevant by the end of trial," *Stringfellow*, 480 U.S. at 380; see *Johnson* v. *Jones*, 515 U.S. 304, 309 (1995) (explaining that exceptions to the final-judgment rule risk "additional, and unnecessary, appellate court work" by permitting "appeals that, had the trial simply proceeded, would have turned out to be unnecessary").

2. Petitioner maintains (Br. 18-27) that a state-action determination is separate from the merits of a Sherman Act claim. Petitioner's analysis assumes (Br. 19) that the "merits" of a Sherman Act claim consist only of issues bearing on whether the defendant engaged in "anticompetitive conduct"—that is, "what conduct actually occurred, whether that conduct had an anticompetitive effect and, if so, whether there was a legitimate business justification for the conduct." Petitioner thus assumes that, in a case like this one, the only "merits"

question is whether the defendant's conduct *would* violate the Sherman Act *if* that conduct were not attributable to the State.

Petitioner makes no effort to defend that assumption, and there is no sound basis for it. Petitioner contends that, "as in the qualified-immunity context, a court adjudicating a claim of state-action immunity assumes that the complaint states a valid claim." Pet. Br. 3 (citation omitted). As explained above, however, a judicial determination that the state-action doctrine applies in a particular case means that the Sherman Act does not prohibit the defendant's conduct. See pp. 16-18, *supra*. A finding that the challenged conduct is attributable to the State therefore necessarily means that the plaintiff has no "valid claim" under the federal antitrust laws.

In any event, even under petitioner's cramped view of the "merits" of a Sherman Act claim, a state-action determination would not be completely separate from the "merits." Application of the clear-articulation requirement, for example, often involves consideration of whether "anticompetitive effects" were the "inherent, logical, or ordinary result" of a state grant of authority to a nonsovereign actor. *Phoebe Putney*, 568 U.S. at 229. Because a State typically does not "catalog all of the anticipated effects" of such an authorization, *ibid.* (citation omitted), a court must construe the authorization "against the backdrop of federal antitrust law," *id.* at 231, in order to determine whether conduct taken pursuant to a particular state regulatory scheme would be "'necessarily'" or "inherently anticompetitive," *id.* at 230 (citation omitted).

That determination "involve[s] considerations enmeshed in" whether the defendant's own conduct was

anticompetitive, *Van Cauwenberghe*, 486 U.S. at 528, requiring elucidation of the relevant principles of federal antitrust law and the application of those principles to the type of conduct in question. Although an "extensive" inquiry into such issues might not always be necessary for purposes of the state-action doctrine, *id.* at 529, the inquiry is still "conceptually" linked to the rest of the case, *Johnson*, 515 U.S. at 314 (citation omitted). Thus, even under petitioner's conception of the "merits" of a suit like this one, the second requirement of the collateral-order doctrine is not satisfied.

C. An Order Determining That The Conduct Of A Public Entity Is Not State Action Is Not Effectively Unreviewable On Appeal From A Final Judgment

1. For an order to qualify for immediate appeal under the collateral-order doctrine, it must also "be effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. at 349 (citations omitted). To satisfy that requirement, an appellant must show that "review after trial would come too late to vindicate [an] important purpose" of the right asserted. *Johnson*, 515 U.S. at 312; see *Lauro Lines* v. *Chasser*, 490 U.S. 495, 499 (1989) ("insist[ing] that the right asserted be one that is essentially destroyed if its vindication must be postponed until trial is completed"). The inquiry also entails "a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Will*, 546 U.S. at 351-352 (citation omitted). The "decisive consideration is whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" *Mohawk Indus.*, 558 U.S. at 107 (quoting *Will*, 546 U.S. at 352-353).

No interest protected by the state-action doctrine is "irretrievably lost" by deferring appeal until after final judgment. *Richardson-Merrell*, 472 U.S. at 431. The state-action doctrine preserves the States' "ability to regulate their domestic commerce." *Southern Motor Carriers*, 471 U.S. at 56. It accomplishes that purpose by placing conduct attributable to the State beyond the reach of the Sherman Act, thereby ensuring that federal antitrust law does not prevent the achievement of the State's regulatory objectives. See pp. 16-18, *supra*. That interest "is fully vindicable on appeal from final judgment." *Digital Equip.*, 511 U.S. at 882; see *Swint*, 514 U.S. at 43 ("An erroneous ruling on liability may be reviewed effectively on appeal from final judgment."). If a district court determines that the defendant's conduct is not state action, and if the defendant is later held liable for a Sherman Act violation, the defendant can raise the state-action issue on appeal from final judgment and will be entitled to vacatur of that judgment if the court of appeals resolves the issue in the defendant's favor.

To be sure, if it is "eventually decided" that the district court erred in finding the state-action doctrine to be inapplicable, "petitioner will have been put to [the] unnecessary trouble and expense" of litigating to final judgment, and therefore will not receive the full practical benefit of a pretrial appellate decision ordering dismissal of the antitrust claims on the pleadings. *Lauro Lines*, 490 U.S. at 499. "It is always true, however, that 'there is value ... in triumphing before trial, rather than after it.'" *Ibid.* (citation omitted). The possibility of avoiding a lengthy and burdensome trial may sometimes be a sound basis for a district court to decide as a matter of discretion to *certify* an issue for interlocutory

appeal. See 28 U.S.C. 1292(b) (specifying, as a precondition for certification, that "an immediate appeal" would "materially advance the ultimate termination of the litigation"). But if the prospect of such burdens by itself were sufficient to render a merits issue "effectively unreviewable on appeal from a final judgment," *Will*, 546 U.S. at 349 (citations omitted), the collateral-order doctrine would "swallow the rule" that the denial of a motion to dismiss (or motion for summary judgment) is not appealable as of right, *Richardson-Merrell*, 472 U.S. at 436 (citation omitted).

For the third requirement of the collateral-order doctrine to be satisfied, it therefore is not enough that "a ruling may be erroneous and may impose additional litigation expense." *Richardson-Merrell*, 472 U.S. at 436. The defendant must show that "a trial * * * would imperil a substantial public interest," *Will*, 546 U.S. at 353, as by establishing that it has an "immunity from suit," *Swint*, 514 U.S. at 43, or a "right not to be tried," *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 801 (1989) (citation omitted). If the defendant is unable to "marshal[]" "some particular value of a high order" "in support of the interest in avoiding trial," *Will*, 546 U.S. at 352, and instead asserts a "mere defense to liability," its claim can be fully vindicated on appeal from a final judgment, *Swint*, 514 U.S. at 43 (citation omitted).

That distinction between immunities from suit and defenses to liability runs throughout this Court's decisions on the collateral-order doctrine. See *Midland Asphalt*, 489 U.S. at 801 ("There is a 'crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges.'") (citation omitted). In each case where the Court has recognized an immunity from suit, "'the essence' of the claimed right"

has been "a right not to stand trial." *Van Cauwenberghe*, 486 U.S. at 524 (citation omitted); see *Osborn* v. *Haley*, 549 U.S. 225, 238-239 (2007) (Westfall Act, 28 U.S.C. 2679); *Puerto Rico Aqueduct*, 506 U.S. at 146 (Eleventh Amendment immunity); *Mitchell*, 472 U.S. at 525-527 (qualified immunity); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749 (1982) (absolute immunity); *Helstoski* v. *Meanor*, 442 U.S. 500, 508 (1979) (Speech or Debate Clause); *Abney*, 431 U.S. at 661 (Double Jeopardy Clause). Thus, "it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Will*, 546 U.S. at 353 (citation omitted).

This Court has never described the state-action doctrine as protecting an antitrust defendant's interest in avoiding trial. Rather, the doctrine "protects the States' acts of governing." *Omni Outdoor Adver.*, 499 U.S. at 383; see *Southern Motor Carriers*, 471 U.S. at 56 ("The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce."). The concern behind the doctrine is not the burden that litigation may impose on entities (like petitioner) that do not partake of the States' sovereign immunity from private suits, but the "burden on the States' power to regulate" that would result if such entities were exposed to Sherman Act liability for implementing state regulatory preferences. *Dental Exam'rs*, 135 S. Ct. at 1109. A defendant's claim that the state-action doctrine renders its conduct lawful therefore is fully vindicable on appeal from final judgment.

2. Petitioner agreed below that, for purposes of the collateral-order doctrine, the "key question" was whether

the state-action doctrine confers an immunity from suit or a defense to liability. Pet. C.A. Br. 42-43. In this Court, however, petitioner describes (Br. 41) that distinction as "analytically unhelpful," and argues (Br. 30) that the analysis should turn instead on "the importance of the interests at stake."

That argument reflects a misunderstanding of the third prerequisite to immediate appeal under the collateral-order doctrine. In determining whether a particular interlocutory order is effectively unreviewable after trial, "[t]he crucial question * * * is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Mohawk Indus.*, 558 U.S. at 108. This Court "routinely require[s] litigants to wait until after final judgment to vindicate valuable rights," including constitutional ones. *Id.* at 108-109; see, *e.g.*, *Flanagan*, 465 U.S. at 260, 262-263 (requiring criminal defendants to wait until after final judgment to vindicate their asserted Sixth Amendment rights). For example, the principle that vertical restraints are less likely to be anticompetitive than horizontal ones is undoubtedly an important tenet of antitrust law; but a defendant's contention that the district court misapplied that principle in denying a motion to dismiss would provide no basis for immediate appeal under the collateral-order doctrine.

Contrary to petitioner's contention (Br. 29-30), this Court's "recent collateral-order cases" do not depart from that approach. Petitioner relies on language using the words "important" and "importance" in describing the criteria for collateral-order review. See *Will*, 546 U.S.

at 355 (concluding that the "judgment bar" of the Federal Tort Claims Act (FTCA), 28 U.S.C. 2676, "has no claim to greater importance than the typical defense of claim preclusion"); *Digital Equip.*, 511 U.S. at 879 (concluding that the inclusion of "a provision in a private contract * * * is barely a prima facie indication that the right secured is 'important'"); *Lauro Lines*, 490 U.S. at 503 (Scalia, J., concurring) (concluding that a right to be sued only in the place specified by a contractual forum-selection clause "is not sufficiently important to overcome the policies militating against interlocutory appeals"). In each of those cases, however, the right at issue was understood to protect an interest in avoiding trial. See *Will*, 546 U.S. at 353 (a right to avoid "further litigation" under the "judgment bar"); *Digital Equip.*, 511 U.S. at 878 (an "immunity from trial" in a settlement agreement); *Lauro Lines*, 490 U.S. at 502 (Scalia, J., concurring) (a contractual "right not to be sued elsewhere than in Naples"). Those decisions make clear that, *even if* the pertinent right is a right to avoid litigation, the collateral-order doctrine's third requirement may not be satisfied if the right is insufficiently important. They do not suggest that the importance of a right by itself can make the challenged order effectively unreviewable on appeal.

3. Petitioner argues (Br. 28, 31-39) that, when the defendant is a public entity, the state-action doctrine protects the same interests as Eleventh Amendment immunity and qualified immunity. Petitioner contends (Br. 25 n.7) that, whatever rule might apply to private defendants, public entities should be entitled to immediate review of adverse state-action rulings before final judgment. That argument lacks merit.

a. Petitioner's contention rests on the premise (Br. 34) that public entities are owed special solicitude under the state-action doctrine. The state-action doctrine, however, is not concerned with particular defendants. See *Southern Motor Carriers*, 471 U.S. at 58-59 ("The success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant."). Rather, the doctrine protects "the States' ability to regulate their domestic commerce." *Id.* at 56; see *Dental Exam'rs*, 135 S. Ct. at 1109 (explaining that the state-action doctrine prevents federal antitrust law from "impos[ing] an impermissible burden on the States' power to regulate"). It applies to nonsovereign actors—whether public or private—only insofar as their actions represent "an exercise of the State's sovereign power." *Dental Exam'rs*, 135 S. Ct. at 1110. That aspect of the doctrine reflects the Court's recognition that, if such actors could be subjected to federal antitrust liability for carrying out the State's policies, those policies would be rendered largely ineffectual. See *Southern Motor Carriers*, 471 U.S. at 56-57 (explaining that the state-action doctrine prevents an antitrust plaintiff from "frustrat[ing]" a state regulatory program "by filing suit against the regulated private parties"). The state-action doctrine thus applies to public and private entities alike, not for their own sake, but to preserve the *State's* regulatory prerogatives.

To be sure, the Court's state-action decisions have distinguished between private entities and certain public ones by holding that the former, but not the latter, are subject to the active-supervision requirement. See *Dental Exam'rs*, 135 S. Ct. at 1112-1113. That aspect of the doctrine, however, simply reflects the decreased risk that certain public entities, such as municipalities

and other local governmental units, might "pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 568 U.S. at 226. It is thus consistent with the understanding that the state-action doctrine exists to protect state regulatory prerogatives, rather than to serve the interests of the nonsovereign public and private entities that carry out the State's will. It does not reflect any greater concern for public entities as such, let alone for the burdens they might face in litigation.

b. Petitioner is also wrong in analogizing (Br. 32-35) the state-action doctrine to Eleventh Amendment immunity. See pp. 18-19, *supra*. Relying on *Puerto Rico Aqueduct*, petitioner asserts that the state-action doctrine protects the same "dignitary interests" that led this Court to treat denials of Eleventh Amendment immunity as immediately appealable. Pet. Br. 35 (quoting *Puerto Rico Aqueduct*, 506 U.S. at 146).

In *Puerto Rico Aqueduct*, however, the Court did not suggest that "dignitary interests" were at risk whenever a public entity was sued. If that were so, a public entity would arguably have a right of immediate appeal in any case in which it had lost a motion to dismiss or motion for summary judgment. Rather, the Court concluded that it was "[t]he very object and purpose of the 11th Amendment * * * to prevent the indignity of" a particular type of suit: a suit "subjecting *a State* to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct*, 506 U.S. at 146 (emphasis added; citation omitted).

Such dignitary interests are not implicated in the mine run of suits against public entities under the federal antitrust laws. See *Mohawk Indus.*, 558 U.S. at 107 (focusing on "the class of claims, taken as a whole").

Most significantly, they are not implicated in suits (including this one) against municipalities or similar governmental entities that, while public in character, "are not considered part of the State for Eleventh Amendment purposes." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989) (citation omitted). Such dignitary interests likewise are not at issue in suits brought by the federal government, from which "States have no sovereign immunity." *West Virginia*, 479 U.S. at 311; see p. 19, *supra*.

The state-action doctrine thus extends to numerous antitrust suits that raise no Eleventh Amendment concern. To be sure, the state-action doctrine reflects solicitude for state prerogatives, by "embody[ing] * * * the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Dental Exam'rs*, 135 S. Ct. at 1110 (citation omitted). But the sovereignty-related interest that the doctrine aims to protect is "the States' power to regulate," *id.* at 1109, not "their privilege not to be sued," *Puerto Rico Aqueduct*, 506 U.S. at 147 n.5. Unlike Eleventh Amendment immunity from suit, a State's interest in enforcement of its regulatory program can be fully vindicated on appeal from a final judgment.

The principle that federal statutes should be construed to avoid unwarranted interference with traditional state prerogatives, moreover, is not limited to the antitrust laws. See, *e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) (absent clear evidence of congressional intent, federal law should not be interpreted in a way that "would upset the usual constitutional balance of federal and state powers"). Defendants in federal lawsuits often invoke that principle in arguing that the statutes they are alleged to have violated do not encompass

their conduct. Nothing in this Court's decisions suggests that, when a defendant moves to dismiss on that basis, the denial of its motion is immediately appealable under the collateral-order doctrine.

c. Petitioner's analogy (Br. 35-39) between the state-action doctrine and qualified immunity is likewise mistaken. Indeed, the Court rejected a similar argument in *Will*. That case involved the judgment bar of the FTCA, which provides that a judgment in an FTCA suit brought against the United States "shall constitute a complete bar" to certain related actions brought against individual federal employees. 28 U.S.C. 2676. When the district court held that the judgment bar did not preclude particular *Bivens* claims brought against various federal customs agents, the agents sought immediate appeal of the court's ruling under the collateral-order doctrine. *Will*, 546 U.S. at 348-349; see *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

In concluding that the district court's ruling was not immediately appealable, this Court acknowledged the argument that "if the *Bivens* action goes to trial the efficiency of Government will be compromised and the officials burdened and distracted, as in the qualified immunity case." *Will*, 546 U.S. at 353. In rejecting that argument, the Court explained:

> [I]f simply abbreviating litigation troublesome to Government employees were important enough for *Cohen* treatment, collateral order appeal would be a matter of right whenever the Government lost a motion to dismiss under the Tort Claims Act, or a federal officer lost one on a *Bivens* action, or a state official was in that position in a case under 42 U.S.C. § 1983, or *Ex parte Young*.

Id. at 353-354. The Court declined to adopt an approach under which Section 1291 "would fade out whenever the Government or an official lost an early round that could have ended the fight." *Id.* at 354. The fact that a public entity is the defendant thus is not, by itself, a sufficient ground for holding that the denial of a motion to dismiss would be effectively unreviewable on appeal from a final judgment.

Petitioner argues (Br. 37) that immediate review of state-action rulings would help save public entities from the "distraction and disruption" of further litigation. But the desire to prevent such litigation burdens is not the rationale for the state-action doctrine. Rather, the doctrine serves a different purpose, unrelated to shielding public but nonsovereign entities from the burdens of litigation. See pp. 23, 25, *supra*.

Any concerns about the ability of public entities to bear the monetary costs of antitrust litigation, moreover, may be addressed in other ways. Indeed, Congress has specifically addressed such concerns in the LGAA, which precludes recovery of antitrust damages in suits against local governments and their employees. 15 U.S.C. 35; see 15 U.S.C. 36 (similarly prohibiting the recovery of antitrust damages on "any claim against a person based on any official action directed by a local government"); Pet. App. 64a-65a (district court holds that the LGAA shields petitioner from antitrust damages in this case). But Congress has not conferred on such entities either an express immunity from suit or any special right to obtain interlocutory review of adverse state-action holdings, as it has in a different context. Cf. 15 U.S.C. 37(b) (providing that persons "involved in the planning, issuance, or payment of charitable gift annuities or charitable remainder trusts shall

have immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial"). Thus, while the state-action doctrine undoubtedly constitutes an important limit on the coverage of federal antitrust law, a public-entity defendant's claim that the district court misapplied the doctrine can be effectively vindicated on appeal from a final judgment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
MAKAN DELRAHIM
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ANDREW C. FINCH
Principal Deputy Assistant Attorney General
FREDERICK LIU
Assistant to the Solicitor General
KRISTEN C. LIMARZI
ROBERT B. NICHOLSON
STEVEN J. MINTZ
Attorneys

DAVID C. SHONKA
Acting General Counsel
Federal Trade Commission

FEBRUARY 2018

APPENDIX

1. 15 U.S.C. 1 provides:

Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

2. 15 U.S.C. 2 provides:

Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

3. 28 U.S.C. 1291 provides:

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

No. 17-368

IN THE

Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

v.

TESLA ENERGY OPERATIONS, INC., FKA SOLARCITY CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

RICHARD M. BRUNELL
Counsel of Record
RANDY M. STUTZ
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 600-9640
rbrunell@antitrustinstitute.org

February 20, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. THE POLICIES UNDERLYING *PARKER* AND SOUND JUDICIAL ADMINISTRATION DICTATE THAT ORDERS DENYING A STATE-ACTION DEFENSE SHOULD NOT BE IMMEDIATELY APPEALABLE AS OF RIGHT 7

A. Denying an Automatic Appeal Imposes Minimal Costs on Defendants Whereas Allowing Such Appeals Imposes Significant Burdens on Our National Policy Favoring Competition 8

B. Under *Parker*, the Balance of Harms Favors Competition. 13

C. Sound Judicial Administration Militates Against Allowing Immediate Appeals as of Right. 16

II. THE LGAA MILITATES AGAINST ALLOWING IMMEDIATE APPEALS OF ORD-ERS DENYING STATE-ACTION PROTECTION 20

III. DEFERRING APPEAL OF STATE ACTION DENIALS TO PUBLIC ENTITIES DOES NOT IMPERIL IMPORTANT INTERESTS 24

A. Petitioner's Proposed Category of Appealable Orders Fails Because It Depends on the Facts of a Particular Case 24

B. Petitioner Has a High Burden of Showing that Important Interests Are Imperiled 27

C. The States' Federalism Interests Are Not Imperiled by Denials of State-Action Protection to Municipal Entities 29

CONCLUSION 32

TABLE OF AUTHORITIES

Page

CASES

Abney v. United States, 431 U.S. 651 (1977) 11

Atlantic Cleaners & Dyers v. United States, 286 U.S. 427 (1932) 14

Bates v. State Bar of Ariz., 433 U.S. 350 (1977) 30

Behrens v. Pelletier, 516 U.S. 299 (1996).....11, 19

Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) .....*passim*

Carroll v. United States, 354 U.S. 394 (1957).....5, 24, 25

City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365 (1991).....26

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 12, 21, 26

Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40 (1982).....29

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).....5, 24

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).....27

Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994).....10, 25, 27, 28, 29

Earles v. State Bd. of Certified Pub. Accountants, 139 F.3d 1033 (5th Cir. 1998) 31

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) 10

FTC v. Monahan, 832 F.2d 688 (1st Cir. 1987) 19

FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216 (2013) .....*passim*

FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992) 14, 15, 17, 18

Gelboim v. Bank of America Corp., 135 S.Ct. 897 (2015) 16

Goldfarb v. Virginia State Bar, 421 US 773 (1975) 12

Hoover v. Ronwin, 466 U.S. 558 (1984) 30

In re Gulevsky, 362 F.3d 961 (7th Cir. 2004) 11

Kay Elec. Co-op v. City of Newkirk, 647 F.3d 1039 (10th Cir. 2011) 12

Manion v. Evans, 986 F.2d 1036 (6th Cir. 1993) 23

Martin v. Mem'l Hosp., 86 F.3d 1391 (5th Cir. 1996) 22

Mitchell v. Forsyth, 472 U.S. 511 (1985) 9, 28

Mohawk Indus., Inc. v. Carptenter, 588 U.S. 100 (2009) .....*passim*

Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91 (2d Cir. 1986) 20

N. Ins. Co. of New York v. Chatham Cty., 547 U.S. 189 (2006) 29

N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n, 135 S. Ct. 1101 (2015) .....*passim*

Owen v. City of Independence, 445 U.S. 622 (1980).....8

Parker v. Brown, 317 U.S. 341 (1943).....2

Patrick v. Burget, 486 U.S. 94 (1988).....14, 15

Pine Ridge Recyling, Inc. v. Butts Cty., Georgia, 855 F. Supp. 1338 (M.D. Ga. 1994).....12

S.C. State Bd. of Dentistry v. Fed. Trade Comm'n, 455 F.3d 436 (4th Cir. 2006).....12

Schwartzman v. Valenzuela, 846 F.2d 1209 (9th Cir. 1988).....11

Scott v. Lacy, 811 F.2d 1153 (7th Cir. 1987).....31

Shames v. Cal. Travel & Tourism Comm'n, 626 F.3d 1079 (9th Cir. 2010) 1, 6

S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985).....13

Teladoc, Inc. v. Texas Medical Bd., No. 16-50017 (June 27, 2016).....1

Teladoc, Inc. v. Texas Medical Bd., 112 F. Supp. 3d 529 (W.D. Tex. 2015) 12

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985).....25, 26

United Nat. Maintenance, Inc. v. San Diego Convention Center, Inc., 749 F.3d 869 (9th Cir. 2014) 1

United States v. MacDonald, 435 U.S. 850 (1978) 25

Visiglio v. Bd. of Dental Exam'rs of Ala., 686 F.3d 1290 (11th Cir. 2012) 31

Will v. Hallock, 546 U.S. 345 (2006) 7, 10, 28, 29

STATUTES

28 U.S.C. §
1291 ..... 25, 27
1292 ..... 3, 9, 10, 20

15 U.S.C. §
35(a) 21
35(b) 21
34-36 8
37 23

OTHER AUTHORITIES

American Antitrust Inst., *State Occupational Licensing Reform and the Federal Antitrust Laws: Making Sense of the Post*-Dental Examiners *Landscape* (Nov. 6, 2017) 2

Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law (4th ed. 2014)
¶ 228a 20

¶ 228b 20

Andrew I. Gavil, *Antitrust Bookends: The 2006 Supreme Court in Historical Context*, 22 Antitrust, Fall 2007 13

H.R. Rep. No. 98-965, 98th Cong., 2d Sess. (1984) 21, 22

U.S. Courts of Appeals Statistical Tables for The Federal Judiciary (December 31, 2016) 9

15A Charles A. Wright & Arthur R. Miller, *Fed. Prac. & Proc.* (2d ed. 2017)
§ 3911 10
§ 3914 31

INTEREST OF AMICUS CURIAE

The American Antitrust Institute ("AAI") is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, econor sts, and business leaders. *See* http://www.antitrustinstitute.org.[1]

AAI has long been concerned about the proper scope of the state-action defense. It submitted amicus briefs in *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015) and *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216 (2013) in support of the positions adopted by the Court. More recently, it filed a brief in the Fifth Circuit in *Teladoc, Inc. v. Texas Medical Bd.*, No. 16-50017 (June 27, 2016), addressing, *inter alia*, the application of the collateral-order doctrine to orders denying state-action protection to state boards controlled by market participants. *See also* Br. for Amicus Curiae American Antitrust Institute, *United Nat. Maintenance, Inc. v. San Diego Convention Center, Inc.*, 749 F.3d 869 (9th

---

[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. No counsel for a party has authored this brief in whole or in part, and no person other than amicus curiae has made a monetary contribution to fund its preparation or submission.

Cir. 2014); Br. for Amicus Curiae American Antitrust Institute, *Shames v. Cal. Travel & Tourism Comm'n*, 626 F.3d 1079 (9th Cir. 2010); American Antitrust Inst., *State Occupational Licensing Reform and the Federal Antitrust Laws: Making Sense of the Post-*Dental Examiners *Landscape* (Nov. 6, 2017).

AAI believes that permitting immediate appeals of interlocutory orders denying the state-action defense to public entities would impede antitrust enforcement, upset the state-regulation/competition balance struck by *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny, and lead to significant judicial inefficiencies. AAI takes no position on the merits of either petitioner's state-action defense or respondents' antitrust claim.

SUMMARY OF ARGUMENT

1. The policies underlying *Parker* and sound judicial administration dictate that orders denying a state-action defense ("*Parker* denials") should not be immediately appealable as of right.

Petitioner and its amici focus on the burdens public entities will suffer if a motion to dismiss on state-action grounds is erroneously denied and they are unable to take an immediate appeal. Those burdens are not cognizable under collateral-order jurisprudence for the reasons discussed in argument III, and they are exaggerated insofar as damages are unavailable. More importantly, petitioner and its amici have missed the other side of the equation: the burdens on antitrust plaintiffs *and the public* that would result when the state-action denial is correct and an

immediate appeal delays and increases the cost of a legitimate antitrust claim. In such situations, delay may mean that anticompetitive conduct and injury continues. And just as petitioner asserts a chilling effect from erroneous denials, there is a chilling effect on potential antitrust plaintiffs from allowing appeals of orders that are correct. Public policy should balance the risks and costs of delaying appeals of incorrect *Parker* denials and the risks and costs of allowing immediate appeals of correct *Parker* denials in potentially meritorious antitrust cases. That balance decidedly *disfavors* allowing automatic appeals for two reasons.

First, as an empirical matter, the likelihood of a successful appeal of a *Parker* denial is low. Indeed, the safety valve of discretionary review under 28 U.S.C. § 1292(b) significantly reduces the likelihood that collateral order treatment will capture any additional meritorious appeals. On the other hand, defendants will have an incentive to appeal every *Parker* denial, even if the chances of success are low. Thus the burden and chilling effect on antitrust plaintiffs are high, particularly with only injunctive relief available.

Second, to the extent there is uncertainty over the balance of harms, the *Parker* doctrine itself favors protecting against the risk of delaying legitimate antitrust claims (our national economic policy favoring competition). As this Court has repeatedly emphasized, the state-action doctrine is disfavored. Moreover, a stringent state-action doctrine is itself consistent with federalism principles. Thus, allowing

appeals of correct decisions denying state-action protection imposes a federalism cost, too.

Allowing immediate appeal is also contrary to sound judicial administration because it may not advance the resolution of the case or the state-action issues themselves. For example, appellate resolution limited to the question of whether state law provides a sufficient *mechanism* for active supervision does not carry the day on that issue; defendants must still make a showing that the State provided meaningful review in fact. Determining whether the clear articulation requirement is satisfied also will often require factual development about the alleged anticompetitive conduct, which may look different on the pleadings, on summary judgment, or after trial. And early resolution of the state-action issue may slow the resolution of weak cases when they can be dismissed more easily on the merits.

2. The Local Government Antitrust Act (LGAA) evinces Congress's considered judgment to strike a balance between burdening local government entities with litigation and chilling legitimate antitrust suits. It struck that balance by restricting antitrust remedies to injunctive relief. Congress did not deem the lesser litigation burdens associated with antitrust suits for injunctive relief worthy of special treatment or sufficiently important to provide for immediate appeal of adverse *Parker* rulings. Indeed, the fact that Congress did not provide for collateral appeal of adverse state-action rulings against municipal entities in the LGAA suggests it did not intend to do so, particularly insofar as Congress has demonstrated, for example, in the Charitable Donation Antitrust

Immunity Act, that it knows how to make an antitrust exemption an immunity from suit (rather than mere liability) when it wishes.

3. Orders denying a state-action defense to public entities on legal grounds do not satisfy the collateral-order test under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). In particular, such orders are not "effectively unreviewable" because deferring review of *Parker* denials does not imperil important interests recognized by the Court.

As an initial matter, petitioner's proposed category of orders for collateral appeal ignores the rule that "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll v. United States*, 354 U.S. 394, 405 (1957). Singling out state-action orders decided on "legal grounds" is inappropriate for the same reasons that successful appeals may not advance the resolution of the case. And singling out state-action orders adverse to "public entities" invites courts into individualized jurisdictional inquiries as to whether an entity is acting in a public or private capacity. Petitioner's proposed category ignores the Court's repeated admonitions that, for state-action purposes, the public or private character of an entity's conduct turns not on formalistic designations by the State, but rather on the risks that the entity will pursue private interests.

Even assuming a cognizable category of orders *arguendo*, *Parker* denials to public entities do not satisfy *Cohen*'s requirements for the simple reason that the state-action defense is not an immunity from suit, but a defense to liability. Beyond that, petitioner has

failed to meet the high burden of establishing that deferring review of the category of orders "so imperils" important interests as to justify the cost of allowing immediate appeal.

Although petitioner identifies interests the Court adjudged to be important in previous cases, it can demonstrate only that *Parker* denials "implicate" these interests in an attenuated sense, not that such denials "imperil" them. Moreover, even if *Parker* denials to some public entities could imperil important interests, petitioner must be able to show that *Parker* denials to municipal entities like itself do so.

Contrary to that necessary showing, a variety of factors *minimize* the extent to which *Parker* denials to municipal entities implicate important interests at all. First, petitioner's argument that the State's federalism interests apply when the defendant is a substate governmental entity is incorrect.Only States and arms of the State enjoy the privileges of preratification sovereignty. Municipal entities unequivocally do not possess a "residual" interest in the State's sovereignty, nor may States delegate their sovereignty to municipal entities. States may only delegate authority to regulate anticompetitively, provided they comply with the requirements of *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 (1980).

Second, the "government efficiency" interest protected by qualified immunity does not support collateral appeal of *Parker* denials. The interest is not independently protected by *Parker*, which means it is only relevant to the extent it is linked to the State's

federalism interests. But for the reasons discussed above, these interests are attenuated at best when the defendant is a municipal entity. In any event, the qualified immunity doctrine protects public officials' decisionmaking only as to the burden of trial from claims for damages, and it does not protect municipalities at all. Those facts defeat the analogy, because municipal entities like petitioner are exempt from damages under the LGAA.

ARGUMENT

I. THE POLICIES UNDERLYING *PARKER* AND SOUND JUDICIAL ADMINISTRATION DICTATE THAT ORDERS DENYING A STATE-ACTION DEFENSE SHOULD NOT BE IMMEDIATELY APPEALABLE AS OF RIGHT

Two fundamental principles should guide the Court's determination of whether to allow orders denying state-action "immunity" into the exclusive club of collateral orders that are immediately appealable. *See Will v. Hallock*, 546 U.S. 345, 350 (2006) ("[A]lthough the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership."). One is the bedrock antitrust principle that, "'given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, state action immunity is disfavored, much as are repeals by implication.'" *Dental Exam'rs*, 135 S. Ct. at 1110 (quoting *Phoebe Putney*, 133 S. Ct. at 1010) (alteration omitted). The other is the principle of the collateral

appeal doctrine that requires a "sufficiently strong [justification] to overcome the usual benefits of deferring appeal until litigation concludes." *Mohawk Indus., Inc. v. Carpenter*, 588 U.S. 100, 107 (2009). Following these principles leads to the inescapable conclusion that petitioner's membership application should be denied.

A. Denying an Automatic Appeal Imposes Minimal Costs on Defendants Whereas Allowing Such Appeals Imposes Significant Burdens on Our National Policy Favoring Competition

Petitioner and its amici argue that automatic immediate appeal of orders denying a state-action defense is necessary to prevent public entities from having to endure the burden of defending antitrust actions to judgment which, they say, can be expensive, distracting, and chill public officials from exercising their lawful duties. Pet. Br. 35-39. Petitioner's amici acknowledge that the Local Government Antitrust Act of 1984 reduces any burden by immunizing local government entities (like petitioner here) and their officials from damages (treble or otherwise) and attorneys' fees under Section 4 of the Clayton Act. NGA Amicus Br. 11-12; 15 U.S.C. §§ 34-36; *see also Owen v. City of Independence*, 445 U.S. 622, 656 (1980) ("The inhibiting effect [of litigation] is significantly reduced, if not eliminated . . . when the threat of personal liability is removed."). Nonetheless, they claim that even a suit for injunctive relief can be expensive, distracting to defend, and have chilling effects. NGA Amicus Br. 12-13.

Petitioner's burden argument is exaggerated at best. Defending against a suit for injunctive relief is an ordinary cost of business that Congress thought municipal entities should be able to bear. *See infra* argument II. But petitioner's burden argument is fundamentally flawed for two additional reasons.

First, petitioner apparently assumes that district courts will often misapply the state-action defense and that appeals of *Parker* denials thus are likely to succeed. However, if the district court is correct and the appeal fails—and the public entity is *not* entitled to the state-action defense—then there is no cognizable burden at all. *Ex ante* there is only a risk of such a burden, and petitioner offers no evidence to suggest that the risk is high. On the contrary, as a general matter the vast majority of appeals will fail.[2] *See Mohawk*, 588 U.S. at 110 (relevant that "[m]ost district court rulings" on attorney-client privilege matters "are unlikely to be reversed on appeal"); *cf. Mitchell v. Forsyth*, 472 U.S. 511, 544 (1985) (Brennan J., dissenting) ("[L]urking behind [sympathetic] cases is usually a vastly larger number of cases in which relaxation of the final judgment rule would threaten all of the salutary purposes served by the rule.").

The likelihood of success is reduced even further when discretionary appeal under 28 U.S.C. § 1292(b) is not allowed because there is "no substantial ground

---

[2] No tracked category of civil appeals involves a reversal rate higher than 14%. *See* Table B-5, U.S. Courts of Appeals Statistical Tables for The Federal Judiciary (December 31, 2016), http://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2016/12/31.

for difference of opinion" on the *Parker* issue, as the district court found here. Pet. App. 25a. More generally, the availability of this "safety valve" should largely screen out *Parker* denials that involve dispositive, close questions, thereby reducing the likelihood that collateral-order treatment would capture any other meritorious (or judicially efficient) appeals. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 883 (1994); *Mohawk*, 558 U.S. at 111.[3] Thus, the *expected* burden on public entities of denying an automatic appeal is likely to be small, even assuming the burden is cognizable under the collateral order doctrine, which it is not. *See* argument III *infra*.

Second, allowing an immediate appeal as of right will impose significant costs on antitrust plaintiffs and impair our national economic policy favoring competition, costs that petitioner and its amici ignore. While appeals will seldom be successful, defendants would have an incentive to assert them in every case as a means of delaying (and thereby discouraging) litigation against them. *See Will*, 546 U.S. at 350 (finality rule serves the "'sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise'") (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)) (alteration in original; internal quote

---

[3] The costs and benefits of an appeal as of right should focus on the category of appeals that do not satisfy the requirements of § 1292(b). *See* 15A Charles A. Wright & Arthur R. Miller, *Fed. Prac. & Proc.* § 3911 (2d ed. 2017) ("The adoption of 28 U.S.C. § 1292(b) . . . has an impact on the proper role of collateral order doctrine.").

marks omitted); *cf. Schwartzman v. Valenzuela*, 846 F.2d 1209, 1210 (9th Cir. 1988) ("State government defendants apparently now deem it mandatory to bring these [qualified immunity] appeals from any adverse ruling, no matter how clearly correct the trial court's decision.").

Particularly when no damages are at stake, public entities would have little reason *not* to delay a potential day of reckoning, even if their chances on appeal are low.[4] And while antitrust claims can lack merit like any others,[5] antitrust actions against public entities are often meritorious, as cases decided by this Court illustrate. *See, e.g., Dental Exam'rs*, 135 S. Ct. 1101 (upholding FTC challenge to state dental

---

[4] To be sure, "'[i]t is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims.'" *Behrens v. Pelletier*, 516 U.S. 299, 310 (1996) (quoting *Abney v. United States*, 431 U.S. 651, 662 n.8 (1977)) (alteration in original). But this can be a low bar for appellants to clear. *See, e.g., In re Gulevsky*, 362 F.3d 961, 964 (7th Cir. 2004) ("An appeal is frivolous when the appellant's arguments are utterly meritless and have no conceivable chance of success.").

[5] Petitioner objects to "the potential for unwarranted condemnation of the way [public entities] made difficult policy judgments and resolved legitimate competing interests," and being sued by "a disgruntled entity [that] disagrees with the way the District's Board exercised the ratemaking authority delegated to it by Arizona." Pet. Br. 37, 38. Of course, the state-action question is decided on the assumption that the antitrust claim is *valid*, as petitioner recognizes, *see id.* at 22, and the collateral-order doctrine does not depend on the merits of a particular appeal. The NGA cites a litany of cases challenging "core governmental functions," a category that apparently includes operating an electric utility. NGA Amicus Br. at 9-10. Notably, half of the cited cases were brought before the LGAA barred damage claims.

board's anticompetitive exclusion of teeth-whitening rivals); *Phoebe Putney*, 568 U.S. 216 (allowing FTC to proceed with challenge to hospital authority's blatantly anticompetitive hospital acquisition); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (allowing claim that municipal utility violated Sherman Act by, among other things, requiring customers of its rival utility to purchase electricity from it as a condition of continued water and gas service); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (holding that State bar participated in conspiracy to maintain minimum fee schedules).[6]

Accordingly, an automatic interlocutory appeal means that some, perhaps many, valid antitrust claims will be delayed, with relief denied to victims or consumers in the interim. Other potentially valid claims will be discouraged because of the delay and increased costs of litigating under a rule allowing

---

[6] In the lower courts, notable examples of meritorious cases against public entities include: *Teladoc, Inc. v. Texas Medical Bd.*, 112 F. Supp. 3d 529 (W.D. Tex. 2015) (enjoining medical board from implementing rule restricting competition from telemedicine providers); *Pine Ridge Recyling, Inc. v. Butts Cty.*, 864 F. Supp. 1338 (M.D. Ga. 1994) (enjoining county solid waste authority from interfering with entry by rival landfill that would reduce costs); *see also Shames*, 626 F.3d 1079 (challenge to state tourism board conspiracy with car rental companies to pass on tourism fees to consumers); *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006) (challenge to dental board regulation restricting dental hygienists from providing services in schools without examination by dentist); *Kay Elec. Co-op v. City of Newkirk*, 647 F.3d 1039 (10th Cir. 2011) (Gorsuch, J.) (challenge by utility to rival municipal electric authority's refusal to provide essential sewage services to a customer unless the customer also purchased the authority's electricity).

immediate appeals, particularly insofar as damages are unavailable. The chilling effect on legitimate antitrust claims is especially significant in light of the myriad other hurdles that antitrust plaintiffs must now surmount. *See* Andrew I. Gavil, *Antitrust Bookends: The 2006 Supreme Court in Historical Context*, 22 Antitrust, Fall 2007, 21, at 25 (citing "more rigorous burdens of pleading, production, and proof, as well as more demanding requirements for standing," as among "the numerous hurdles that now lie in the path of a successful antitrust prosecution [which] have significantly increased the direct costs of bringing and processing antitrust cases").

B. Under *Parker*, the Balance of Harms Favors Competition

The state-action doctrine itself is not agnostic on the question of how to balance the minimal risk of harm from potential delays in overturning the rare erroneous *Parker* denial against the risk of harm to antitrust victims *and the public* from delays in resolving legitimate antitrust claims. The Court recognizes the "conflicts that may arise between principles of federalism and the goal of the antitrust laws," *S. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 62 (1985), and it has resolved that "state-action immunity is disfavored" given "the fundamental national values of free enterprise and economic competition." *Dental Exam'rs*, 135 S. Ct. at 1110 (quoting cases; internal quotation marks omitted).

When such conflicts arise, *Parker* and its progeny do not stand for the proposition that federalism principles tolerate limited intrusions from the national

competition policy, but rather that the national competition policy tolerates limited intrusions from anticompetitive conduct authorized by States. After all, when the *Midcal* (or any other exemption's) requirements are *not* satisfied the antitrust laws preempt anticompetitive state law under the Supremacy Clause. *See Midcal*, 445 U.S. at 111 ("Congress 'exercis[ed] all the power it possessed' under the Commerce Clause when it approved the Sherman Act." (quoting *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 435 (1932))) (alteration in original).

The Court's skepticism of the state-action exemption is reflected in its demanding application of the *Midcal* requirements. For example, the clear-articulation requirement means that a state legislature may well "intend" to authorize particular anticompetitive conduct by local officials, but unless that intent is clearly and affirmatively articulated in state law, *Parker* protection will not apply to non-sovereign actors. *See Phoebe Putney*, 568 U.S. at 231 (state grants of general powers are made "against the backdrop of federal antitrust law"). Likewise, a State may create and implement a supervisory scheme to oversee anticompetitive acts of local officials, but unless the state supervisors both "have *and exercise* power to review particular anticompetitive acts," *Patrick v. Burget*, 486 U.S. 94, 101 (1988) (emphasis added), *Parker* protection does not apply. *See FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992) (no defense where "potential for state supervision was not realized in fact").[7]

---

[7] Indeed, the Court has squarely considered and repeatedly rejected litigation burdens and chilling risks as a basis for weak-

Importantly, the Court has also emphasized that stringent application of the *Midcal* requirements actually serves to *advance* federalism interests. It has reasoned that "[a] national policy of such a pervasive and fundamental character is an essential part of the economic and legal system within which the separate States administer their own laws for the protection and advancement of their people." *Ticor*, 504 U.S. at 632. Accordingly, as Arizona itself and other States have argued when it suits them, "[c]ontinued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls." *Id.* at 632.[8]

Thus, throughout its state-action case law, the Court has resolved doubts in favor of the national competition policy. So too here, doubts about the rela-

---

ening the *Midcal* factors. *See, e.g.*, *Dental Exam'rs*, 135 S. Ct. at 1115 (regulatory boards); *Patrick*, 486 U.S. at 105-06 (physician peer review).

[8] *See* Br. of Amici Curiae States of Illinois et al. 16-17, *FTC v. Phoebe Putney*, 568 U.S. 216 (2013) (No. 11-1160) (failure to enforce the antitrust laws in appropriate circumstances "disserves rather than serves the federalism principle" and "impedes rather than advances the States' 'freedom of action'"); *id.* at 17 (warning against using *Parker* to undermine "the very interests of federalism it is designed to protect" (internal quotations omitted)). And this Court has found these arguments persuasive. *See Phoebe Putney*, 568 U.S. at 236 (agreeing with States' brief and declining to set "a trap" for unwary state legislatures); *Ticor*, 504 U.S. at 635 (agreeing with States' brief and calling it a "powerful refutation" of view that broad application of state-action defense is warranted under federalism principles).

tive risks of denying or allowing automatic interlocutory appeals should be resolved in favor of promoting competition and avoiding burdening and chilling legitimate antitrust claims.[9]

C. Sound Judicial Administration Militates Against Allowing Immediate Appeals as of Right

Petitioner contends that "[a]llowing immediate appeal from orders denying a state-action immunity to public entities on legal grounds poses very little risk of requiring appellate courts to consider the same issues twice." Pet. Br. 23. Amicus States add that resolving state-action questions "at the earliest possible stage of the litigation" will "not invite piecemeal litigation or cut against finality interests." States' Amicus Br. 24, 32; *see Gelboim v. Bank of America Corp.*, 135 S. Ct. 897, 905 n.5 (2015) ("In delineating the narrow scope of the 'collateral-order' doctrine, we have cautioned against permitting piecemeal, prejudgment appeals.") (emphasis omitted). They are mistaken. Allowing early appeals as of right is a recipe for judicial inefficiency and piecemeal litigation for several reasons besides the fact that (as noted above) most appeals of *Parker* denials will be unsuccessful.

---

[9] Petitioner contends that the calculus changes when the *Midcal* requirements *are* met, and hence the disfavored status of the state-action defense does not undermine "the need for immediate appeal of orders denying it." Pet. Br. 46. But this simply ignores the costs on the other side of the *Parker* equation (including for federalism values) of delaying legitimate antitrust claims that do *not* meet the requirements and making them more expensive to litigate.

First, the state-action issue likely cannot be conclusively resolved on the pleadings when active supervision is at issue. Petitioner recognizes the factual nature of the active-supervision issue, *see also supra* at 14, but nonetheless argues that "other [active-supervision] denials are on legal grounds," including denials with respect to "whether state law provides the requisite mechanisms for supervision by state officials." Pet. Br. 22-23. However, defining the "category" of cases at issue to include only orders that deny a state-action defense to public entities on "legal grounds" is inappropriate. *See* Resp. Br. 45-53; *infra* argument III.A. In any event, petitioner would have an appeals court decide half the active-supervision question for naught. An appellate reversal on whether state law provides a legally sufficient means for supervision would *not* itself entitle the public entity to protection. The entity would still have to overcome the additional evidentiary hurdle as to whether supervision was realized in fact. *Ticor*, 504 U.S. at 638.

Second, even the clear-articulation prong often may not be conclusively resolvable on the pleadings. One can measure state law against the allegations in the complaint and *sometimes* conclude that the alleged anticompetitive conduct is within or outside the intended scope of the authorized conduct. But the record will often require factual development of the merits of plaintiff's claim before a conclusive determination can be made, because clear articulation requires a substantial degree of fit between the authorization and the specific conduct at issue. *See Phoebe Putney*, 588 U.S. at 229 ("displacement of competition [must be] the inherent, logical, or ordi-

nary result of the exercise of authority delegated by the state legislature"); *Ticor*, 504 U.S. at 636 (both *Midcal* prongs are "directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy").

Here, for example, petitioner maintains that its "rate plan" for self-generating solar customers was a legitimate effort to ensure that they pay their fair share of fixed costs, and that any exclusion of solar providers was a foreseeable (and incidental) effect of petitioner's rate-making authority. Pet. Br. 7-9. However, the complaint alleged otherwise—that "the purpose of the [rate plan] is not to recoup reasonable grid-related costs from distributed solar customers, but to prevent competition from SolarCity (and other providers of distributed solar) by punishing customers who deal with such competitors." J.A. 34-35 (¶ 113).[10]

Thus, a district court (as here) might deny a motion to dismiss on state-action grounds based on the allegations in the complaint, but on summary judgment determine that the defendant's purpose was legitimate, and therefore that its conduct was a foreseeable result of exercising its statutory authority with only an incidental harmful effect on competition. An immediate appeal of the 12(b)(6) ruling would likely delay the conclusive resolution of the clear-

---

[10] As noted above, AAI takes no position on the merits of respondent's antitrust claim or of petitioner's state-action defense. The facts are used here only for illustrative purposes.

articulation issue with no offsetting benefit.[11] *Cf. FTC v. Monahan*, 832 F.2d 688, 689 (1st Cir. 1987) (Breyer, J.) (holding that evaluation of state-action defense asserted by regulatory board required development of the facts as to the details of the anticompetitive conduct at issue, including whether the challenged rules were justified by legitimate regulatory purposes).

Finally, early resolution of the state-action issue is wasteful because other defenses may more efficiently terminate a case. A public entity may seek to appeal the denial of a motion to dismiss on state-action grounds in a case where the antitrust claims are weak and otherwise would be dismissed on summary judgment (say because of a lack of market power). Again, an immediate appeal is likely to be a waste of time and to delay the more efficient resolution of the matter. Indeed, the leading antitrust treatise goes so far as to counsel courts and litigants against "elaborate inquiry . . . into the legal basis for immunity" when issues of liability can be "easily resolved" on a Rule 12(b)(6) motion or with minimal discovery. Phillip E. Areeda & Herbert Hovenkamp,

---

[11] The risk that an appeals court may have to consider the same issues on multiple occasions is high. The appeals court may need to consider the clear-articulation issue in light of the anticompetitive conduct alleged in the complaint. Then it may need to consider the same issue in light of the facts as to the conduct adduced at summary judgment. And then it may need to consider the same issue on appeal from a final judgment based on the facts established at trial. *Cf. Behrens*, 516 U.S. at 321 (Breyer, J., dissenting) (Court's rationale for allowing two prejudgment appeals of qualified immunity rulings would "in principle, justify several appeals where discovery, proceeding in stages, continuously turns up new facts").

Antitrust Law ¶ 228a-b, at 227 (4th ed. 2014); *see also id.* ¶ 228b, at 230 ("One area where turning to the antitrust merits may resolve the dispute more quickly than a search for immunity is where the government is a market participant . . . .").

While an automatic appeal therefore will often result in the waste of judicial resources, increased litigation costs, and delay, the availability of discretionary appeal under 28 U.S.C. § 1292(b) ensures that an interlocutory appeal will be available in close cases when resolution of the state-action issue "may materially advance the ultimate termination of the litigation."

II. THE LGAA MILITATES AGAINST ALLOWING IMMEDIATE APPEALS OF ORDERS DENYING STATE-ACTION PROTECTION

The enactment of the Local Government Antitrust Act of 1984 militates against extending *Cohen* to *Parker* denials. Seeking to limit the burden on local government entities from being subject to the Sherman Act, Congress carefully chose to exempt them and their officials from exposure to suits for damages and attorneys' fees, but not to completely immunize them from liability. Rather, the Act "does not apply to claims for injunctive relief under the Sherman Act." *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 95 (2d Cir. 1986).[12]

---

[12] The Act provides, in a damage action under the Clayton Act, "No damages, interest on damages, costs, or attorney's fees may be recovered . . . from any local government, or official or employee thereof acting in an official capacity," or from "a [private] person based on any official action directed by a local govern-

As the NGA emphasizes, "the LGAA reflects Congress's recognition of the burden antitrust suits place on local governments." NGA Amicus Br. 12. The House Judiciary Committee acknowledged the concern that municipalities may be subject to damage judgments borne by taxpayers, "substantial" litigation costs, and difficulties attracting qualified persons to serve. H.R. Rep. No. 98-965, 98th Cong., 2d Sess. at 10-11 (1984). And, the Committee recognized the argument that "governmental operations" may be dislocated "should an obstructionist plaintiff threaten a local government with an antitrust suit simply because he disagrees with a regulatory decision," and that "[s]uch threats could paralyze government decisionmaking or divert it from the course elected officials believe to be in the public interest." *Id.*

But Congress also recognized the benefits of continuing to subject local government entities to the antitrust laws and chose to confer only a limited exemption. For example, the Committee quoted the Court's majority opinion in *City of Lafayette*, 435 U.S. at 408, with emphasis: "'*If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to the anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.*'" *Id.* at 9; *see also id.* at 18. The Committee concluded: "Any legislative solution . . . should weigh the chilling effect of potential or actual antitrust liti-

---

ment, or official or employee thereof acting in an official capacity." 15 U.S.C. §§ 35(a), 36(a).

gation on local governments and their officials against the need to preserve some right of redress for private persons (including consumers) harmed by anticompetitive conduct." *Id.* at 12-13. Accordingly, rather than enact a broader immunity, the Committee concluded that the "most balanced legislative response at this time would be to restrict private remedies to injunctive relief." *Id.* at 18.

This legislative history demonstrates three points. First, insofar as the LGAA "endorsed and expanded the state action doctrine," *Martin v. Mem'l Hosp.*, 86 F.3d 1391, 1397 (5th Cir. 1996), it also limited it as well, and it struck the balance between burdening local government entities and chilling legitimate antitrust suits by restricting antitrust remedies to injunctive relief. That balance would be undone by tilting the final-decision rule to favor municipal defendants.

Second, the LGAA demonstrates Congress's belief that public entities' interest in avoiding being subject to litigation is not sufficiently important to treat the state-action defense differently from other defenses subject to ordinary appellate procedure. *See* H.R. Rep. No. 98-965, at 12 (finding "merit" in critics' assertion that "the costs of responding to antitrust litigation . . . are no more unmanageable for local governments than the costs of responding to other litigation").

Third, that Congress chose to address the supposed "deluge" of antitrust litigation against municipal entities without providing for an immediate appeal of adverse state-action rulings suggests it did

not intend to do so. *See id.* at 11. Congress certainly knows how to make an antitrust exemption an immunity from suit when it wishes. For example, the Charitable Donation Antitrust Immunity Act of 1997 provides for "immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial, for the [specified] conduct." 15 U.S.C. § 37; *cf. Manion v. Evans*, 986 F.2d 1036 (6th Cir. 1993) (holding that Health Care Quality Improvement Act of 1986, which shields physician peer reviewers from antitrust (and other) damages liability, but not from injunctive relief, did not create an "immunity from suit" which would support an immediate appeal).

To be sure, the LGAA does not apply to all public entities, but other immunity may provide similar protection to state agencies and officials. *See infra* note 16. In any event, as demonstrated below, if municipal entities like petitioner do not satisfy the requirements for a collateral appeal, then petitioner's proposed class of appealable orders (*Parker* denials to "public entities") is defective and the collateral order doctrine is not applicable. *See infra* III.B.

III. DEFERRING APPEAL OF STATE-ACTION DENIALS TO PUBLIC ENTITIES DOES NOT IMPERIL IMPORTANT INTERESTS

The Ninth Circuit correctly held that the collateral-order rule does not apply because the *Parker* doctrine is not an immunity from suit; it is merely a defense and limit on the scope of the Sherman Act. Hence denials are effectively reviewable after final judgment and ineligible for collateral appeal under the third prong of the *Cohen* test. *See Cohen*, 337 U.S. at 546 ("rights . . . will have been lost, probably irreparably"). Petitioner argues that what counts under the third prong is merely whether a sufficiently important interest is implicated, Pet. Br. 28-30, but respondent correctly points out that an important interest is an *additional* requirement where immunities are concerned, not an independent substitute for the right to avoid the burdens of litigation. Resp. Br. 24-29. In any event, petitioner has failed to show that *Parker* denials to "public entities" satisfy the third *Cohen* prong, for several reasons.

A. Petitioner's Proposed Category of Appealable Orders Fails Because It Depends on the Facts of a Particular Case

As an initial matter, petitioner's proposed category of collaterally appealable orders is improper because it depends on whether an entity is acting as a "public" entity on a given set of facts. The Court has held that the fact that Congress "draw[s] the jurisdictional statutes in terms of categories" means "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll*, 354 U.S. at 405; *see United*

States v. MacDonald, 435 U.S. 850, 857 n.6 (1978) (Congress defined the concept of "'final decisions'" under § 1291 "'in terms of categories'" (quoting *Carroll*, 354 U.S. at 405)); *cf. Digital Equip.*, 511 U.S. at 868 (appealability under *Cohen* must be satisfied for "the entire category to which a claim belongs"); Resp. Br. 39, 42-45 (discussing factual differences among claims within a proposed category as fatal under second *Cohen* prong).

At one end of the spectrum, petitioner's proposed category includes orders against the "State itself" and "arms of the State," which operate in the public interest and are *ipso facto* exempt under *Parker*. It also includes orders against nonsovereign substate entities (*e.g.*, inferior state agencies), which are presumed to operate in the public interest and are therefore entitled to state-action protection so long as they are not market participants and are acting pursuant to clearly articulated state policy. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985). And it includes orders against nonsovereign municipal agencies, which are also presumed to operate in the "public" interest so long as they are not market participants and satisfy the first *Midcal* prong, but the Court is mindful that there is a "real danger" they may be pursuing "purely parochial public interests at the *expense* of more overriding state goals." *Id.* at 47 (explaining that clear-articulation requirement is necessary to mitigate this risk) (emphasis added).[13]

---

[13] Although they may be engaging in "public" conduct, the fact that municipal entities may be pursuing parochial interests at the expense of overriding state goals, that they are not themselves sovereign, and that they are immune from damages under the LGAA, all bear significantly on whether the State's

More dubiously, petitioner's proposed category could include orders against nonsovereign substate and municipal entities that are controlled by (or are themselves) market participants, which though "public" in some respects, are treated as "private" for state-action purposes under *Midcal*, because they "are more similar to private trade associations vested by States with regulatory authority than to the agencies *Hallie* considered." *Dental Exam'rs*, 135 S. Ct. at 1114; *see also City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 379 (1991) (discussing market-participant exception); *City of Lafayette*, 435 U.S. at 419 (Burger, C.J., concurring) (same).

Finally, at the far end of the spectrum are purely private entities, which petitioner's *logic* suggests should be treated like public entities insofar as they satisfy the *Midcal* test and act in furtherance of state policy. *See* Pet. Br. 34 ("Absent the immunity, [they] could be subject to years of antitrust litigation for helping states exercise their fundamental sovereign prerogative to regulate their economies within their borders.").

Except where sovereign entities constitute the "State itself," the question of whether an entity claiming the state-action defense is acting in a public or private capacity is inherently fact driven. *See, e.g., Dental Exam'rs*, 135 S. Ct. at 1114 (state-action defense "turns not on the formal designation given by States to regulators but on the risk that active mar-

---

federalism interests are imperiled, as discussed throughout the remainder of this section.

ket participants will pursue private interests in restraining trade"). Accordingly, the distinction is unacceptable as a basis for forming a "category" of final decisions under § 1291. *Mohawk*, 558 U.S. at 107 ("we do not engage in an 'individualized jurisdictional inquiry.'" (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 473 (1978))).[14]

B. Petitioner Has a High Burden of Showing that Important Interests Are Imperiled

At a minimum, petitioner's argument that the third *Cohen* prong is satisfied depends on its ability to demonstrate that important interests are imperiled when immediate appeal of state-action orders is denied to municipal entities like itself. The Court does not allow collateral appeal of categories of orders that include identifiable subcategories which fail to satisfy the *Cohen* requirements. *See supra* argument III.A; *cf. Mohawk*, 558 U.S. at 112 ("That a fraction of orders" in the category may "harm individual litigants in ways that are 'only imperfectly reparable' does not justify making all such orders immediately appealable as of right under § 1291" (quoting *Digital Equip.*, 511 U.S. at 872)).

Petitioner has not made the required showing. At most, it has suggested that the federalism interests it has identified are "implicated" with respect to

---

[14] Of course, the fact-driven inquiry into whether a *Parker* denial is decided on "legal grounds," *see supra* argument I.C (explaining why fact issues prevent both active supervision and clear articulation from being conclusively resolved on the pleadings), also independently renders the category unacceptable.

suits against municipal entities, not that they are imperiled. Moreover, petitioner's analogy to the important interests underlying Eleventh Amendment immunity and qualified immunity is unavailing as to municipal entities. Indeed, the nature and scope of those immunities, as well as the immunity from damages provided by the LGAA to local governments and their officials, *minimizes* the extent to which the State's important interests are implicated at all.

Petitioner has identified two interests that this Court has previously held are "important in *Cohen*'s sense," *Digital Equip.*, 511 U.S. at 879 (internal quote marks omitted), namely the State's dignitary (and related federalism) interests and the interest in not chilling public officials' exercise of regulatory discretion, which supported immediate appealability of Eleventh Amendment and qualified immunity denials respectively, *see Will*, 546 U.S. at 352 (discussing *Puerto Rico Aqueduct* and *Mitchell*). Petitioner repeatedly states that denials of state-action protection to municipal entities "implicate" these interests. Pet. Br. 13 (state-action defense "implicates" two interests the Court previously recognized as important); *see also id.* at 28, 31, 41, 43. That is not the Court's standard, nor should it be.

Instead, the Court's "importance" test is "whether deferring review until final judgment so imperils the [important] interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Mohawk*, 558 U.S. at 108. *Parker* denials against municipal entities fall far short of meeting this exacting standard. To deem an important interest "imperiled" if it has only an attenuated connection

to an adverse order would be contrary to this Court's admonition to "view claims of a right not to be tried with skepticism, if not a jaundiced eye," *Digital Equip.*, 511 U.S. at 873, and would "raise the lawyer's temptation to generalize," *Will*, 546 U.S at 350. *See also Mohawk*, 558 U.S. at 108 ("The crucial question . . . is not whether an interest is important in the abstract"); *Digital Equip.*, 511 U.S. at 872 ("mere identification of some interest that would be irretrievably lost has never sufficed to meet the third *Cohen* requirement").

C. The States' Federalism Interests Are Not Imperiled by Denials of State-Action Protection to Municipal Entities

Petitioner points out, "Since its inception in *Parker*, the doctrine of state-action immunity has been animated by principles of federalism and respect for state sovereignty." Pet. Br. 32. From this unexceptional premise, petitioner argues that the State's federalism interests "apply not only when the defendant is a state but also when (as here) it is a sub-state governmental entity carrying out a state's economic policies." Pet. Br. 34. But when a state-action defense is denied to municipal entities, those interests are attenuated, if they are implicated at all.

"Ours is a *dual* system of government, which has no place for sovereign cities." *Cmty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 53 (1982) (emphasis in original) (internal quotation and citation omitted). The Court has squarely rejected the argument that the privileges of sovereignty extend to sub-state government entities asserting a "residual" federalism

interest belonging to the State. *N. Ins. Co. of New York v. Chatham Cty.*, 547 U.S. 189, 194 (2006) (only States and arms of the State, not counties, enjoy the privileges of preratification sovereignty that States retain today). It has faithfully honored this principle in the state-action context. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 576 (1984) (suit is against State itself and defendant is *ipso facto* immune where state supreme court is the real party in interest); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977) (defense granted where Arizona Supreme Court was real party in interest); *City of Boulder*, 455 U.S at 53 (rejecting argument that city ordinance was "an 'act of government' performed by the city *acting as the State* in local matters" as "both misstat[ing] the letter of the law and misunderstand[ing] its spirit") (emphasis in original).

Municipal actors like the District have no claim to Arizona's federalism interests if the State of Arizona is not the real party in interest, which the District does not claim here. Arizona cannot delegate its *sovereignty* to municipal subdivisions; it can only delegate authority to regulate anticompetitively, provided it complies with the applicable *Midcal* factors. *Cf. Dental Exam'rs*, 135 S. Ct. at 1111 ("[U]nder *Parker* and the Supremacy Clause, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants.").

Petitioner asserts that an independent interest in "government efficiency" analogous to that protected by qualified immunity is at stake. But this inter-

est cannot be viewed as an independent interest protected by *Parker*; rather, it is only relevant insofar as it its tied to federalism concerns, which are attenuated when it comes to municipalities, for the reasons stated above.[15] In any event, the qualified immunity analogy is not helpful to petitioner's cause. That doctrine protects public officials' decisionmaking only as to the burden of trial from claims for damages. *See, e.g., Scott v. Lacy*, 811 F.2d 1153, 1154 (7th Cir. 1987) ("The 'right not to be tried' pertains to the request for damages alone, for that is the source of the distraction."). And it does not protect municipalities at all. It hardly can justify an immediate appeal in actions against local governments or their officials for injunctive relief, which is the only relief available after the LGAA. And, indeed, Congress has determined that the burden on local government authorities of standing trial for injunctive relief does not warrant special treatment. *See supra* argument II; *cf.* Wright & Miller § 3914.10 ("Many government parties . . . can fairly be described as institutional litigants that routinely bear the burdens of trial.").[16]

---

[15] Another significant difference between orders denying Eleventh Amendment or qualified immunity on the one hand, and orders denying a state-action defense on the other, is that "erroneous" appeals of the former do not themselves sacrifice federalism interests, whereas "erroneous" appeals of *Parker* denials may well do so. *See supra* argument I.B.

[16] The availability of sovereign immunity to bar damages against state entities also minimizes the extent to which the State's federalism interests could be imperiled by orders denying automatic appeals of adverse state-action rulings to state agencies and officials. Several lower courts have held that such immunity precludes damages in federal antitrust cases against state entities and officials. *See, e.g. Visiglio v. Bd. of Dental Ex-*

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

RICHARD M. BRUNELL
Counsel of Record
RANDY M. STUTZ
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 600-9640
rbrunell@antitrustinstitute.org

Dated: February 20, 2018

---

am'rs of Ala., 686 F.3d 1290 (11th Cir. 2012); *Earles v. State Bd. of Certified Pub. Accountants*, 139 F.3d 1033 (5th Cir. 1998); *cf. Dental Exam'rs*, 135 S. Ct. at 1115 (acknowledging, but not addressing point). To be sure, as petitioner points out, Eleventh Amendment immunity does not apply to suits against States brought by the United States, Pet. Br. 34-35 n.9, but that raises collateral appealability questions for what is undoubtedly a miniscule category of state-action orders. In any event, the Court need not decide whether continued antitrust suits against a State or state officials imperils important federalism interests, because any such category would exclude petitioner.

No. 17-368

In The Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

v.

SOLARCITY CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMERICAN PUBLIC POWER ASSOCIATION AND LARGE PUBLIC POWER COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JOHN M. BAKER
Counsel of Record
JENNY GASSMAN-PINES
CHRISTOPHER L. SCHMITTER
CAITLINROSE H. FISHER
GREENE ESPEL PLLP
222 S. Ninth Street, Suite 2200
Minneapolis, MN 55402
(612) 373-0830
jbaker@greeneespel.com

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. PUBLIC POWER UTILITIES SERVE PUBLIC OBJECTIVES AND PROVIDE CRITICAL SERVICES 4

A. Public power utilities are governmental entities that serve a public purpose 6

B. Public power utilities provide critical public services 11

II BARRING STATE-ACTION IMMUNITY APPEALS UNTIL THE END OF TRIAL COURT LITIGATION UNDERMINES THE IMMUNITY'S PURPOSE AND CREATES NEGATIVE CONSEQUENCES FOR THE PUBLIC 14

A. Barring immediate appeal here undermines state-action immunity's purpose of resolving conflicts between federalism and antitrust principles 14

B. Delay will have negative consequences for public power utilities, and the public 17

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 536 F.3d 68 (1st Cir. 2008) 19

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 18, 19

Big Country Foods, Inc. v. Bd. of Educ. of Anchorage School Dist., Anchorage, Alaska, 952 F.2d 1173 (9th Cir. 1992) 16

City of Columbus v. Ours Garage and Wrecker Service, Inc., 536 U.S. 424 (2002) 15

City of Trenton v. State of New Jersey, 262 U.S. 182 (1923) 15

Cmty. Commc'ns Co. v. City of Boulder, Colo., 455 U.S. 40 (1982) 4, 15, 16

Danner Const. Co. v. Hillsborough Cty., No. 8:09-CV-650-T-17TBM, 2009 WL 2144716 (M.D. Fla. July 15, 2009), *rev'd and remanded sub nom. Danner Const. Co. v. Hillsborough Cty., Fla.*, 608 F.3d 809 (11th Cir. 2010) 21

F.T.C. v. Phoebe Putney Health Sys., Inc., 568 U.S. 216 (2013) 5

Grason Elec. Co. v. Sacramento Mun. Util. Dist., 770 F.2d 833 (9th Cir. 1985) 5, 11, 21

In re Travel Agent Comm'n Antitrust Litig., 583 F.3d 896 (6th Cir. 2009) 19

TABLE OF AUTHORITIES – Continued

Page

Johnson v. Princeton Public Utilities Commission, 899 N.W.2d 860 (Minn. Ct. App. 2017).....22

Jordan v. Zidel, 191 A.2d 17 (N.J. 1963).....7

Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397 (9th Cir. 1991).....5

Lease Lights, Inc. v. Pub. Serv. Co. of Okla., 849 F.2d 1330 (10th Cir. 1988).....20

Martin v. Mem'l Hosp. at Gulfport, 86 F.3d 1391 (5th Cir. 1996).....16

N.C. State Bd. of Dental Examiners v. F.T.C., 135 S. Ct. 1101 (2015)..... 4, 5, 6, 11, 13

Northwest Austin Municipal Utility District No. One v. Holder, 557 U.S. 193 (2009).....22

Pac. Gas & Elec. Co. v. Sacramento Mun. Util. Dist., 92 F.2d 365 (9th Cir. 1937).....8

Parker v. Brown, 317 U.S. 341 (1943).....4, 7

Preferred Commc'ns, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985).....16

Robert F. Booth Trust v. Crowley, 687 F.3d 314 (7th Cir. 2012).....19

S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985).....14

State v. City of Austin, 331 S.W.2d 737 (Tex. 1960).....11, 12

TABLE OF AUTHORITIES – Continued

Page

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 23

Trigen-Okla. City Energy Corp. v. Oklahoma Gas & Elec. Co., 244 F.3d 1220 (10th Cir. 2001) 20

STATUTES

16 U.S.C. § 824(a) 11

28 U.S.C. § 1292(b) 21

Ames Iowa Municipal Code § 28.701(3) 22

Redding California Code of Ordinances § 14.22.170(A) 22

RULES

U.S. Sup. Ct. Rule 37.6 1

OTHER AUTHORITIES

2015 Governance Survey, Am. Pub. Power Ass'n (May 2015), https://www.csu.org/CSUDocuments/appagovernancesurvey2015.pdf 22

Alan Richardson & John Kelly, *The Relevance and Importance of Public Power in the United States*, 19 Nat. Resources & Env't 54 (2005) 3, 5, 7, 10, 17

Am. Pub. Power Ass'n, 2016-17 Annual Directory & Statistical Report (2017) 21

Anoka Mun. Util., http://www.anokaelectric.gov office3.com/ (last visited Jan. 18, 2018) 10

TABLE OF AUTHORITIES – Continued

Page

Brian T. Fitzpatrick, *Twombly and Iqbal Reconsidered*, 87 Notre Dame L. Rev. 1621 (2012) 23

John E. Kwoka, Jr., *Governance Alternatives & Pricing in the U.S. Electric Power Industry*, 18 J.L. Econ. & Org. 278 (2002) 6, 9

Lois R. Lupica, *Transitional Losses in the Electric Power Market: A Challenge to the Premises Underlying the Arguments for Compensation*, 52 Rutgers L. Rev. 649 (2000) 12

Manual for Complex Litigation, Fourth § 30 (2004) 19

Mike Maciag, *From Police Shootings to Playground Injuries, Lawsuits Drain Cities' Budgets*, Governing (Nov. 2016), *available at* http://www.governing.com/topics/finance/gov-government-lawsuits-settlements.html 18

Our Members, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/our-members 6

Our Members, Large Pub. Power Council (2017), http://www.lppc.org/who-we-are/our-members.....6

Our Services, Coldwater Bd. of Pub. Utils., http://www.coldwater.org/415/Our-Services (last visited Jan. 18, 2018) 12

Owatonna Pub. Utils., http://www.owatonnautilities.com/ (last visited Jan. 18, 2018).....12

Public Power, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power 7, 9, 17, 21

TABLE OF AUTHORITIES – Continued

Page

Public Power Pays Back, Am. Pub. Power Ass'n (Apr. 2016), http://appanet.files.cms-plus.com//PDFs/PublicPowerPaysBack2014.pdf 10

Rates, Hastings Utils., https://www.hastings-utilities.com/rates/ (last visited Jan. 18, 2018) 13

Richard Rudolph & Scott Ridley, *Power Struggle: The Hundred-Year War over Electricity* (1986) 8

Robert A. Skitol and Kennedy M. Vorrasi, *Justice Stevens' Antitrust Legacy*, 24 Antitrust No. 3 (Summer 2010) 19

Roger L. Kemp, Managing America's Cities: A Handbook for Local Government Productivity (2007) 18

Security Lighting, Bryan Mun. Utils., https://www.cityofbryan.net/security-lighting/ (last visited Jan. 18, 2018) 13

Stats and Facts, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power/stats-and-facts 7

Stop, Start, Move Service, Idaho Falls Power, https://www.idahofallsidaho.gov/268/Stop-Start-Move-Service (last visited Jan. 18, 2018) 13

Twentieth Century Fund, Electric Power and Government Policy (1947) 8

TABLE OF AUTHORITIES – Continued

Page

Water: Facts & Figures, L.A. Dep't of Water & Power, https://www.ladwp.com/ladwp/faces/ladwp/aboutus/a-water/a-w-factandfigures?_adf.ctrl-state=1br8pf1ntd_4&_afrLoop=1054280876754233 (last visited Jan. 18, 2018) 12

William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887 (2003) 18

William J. Hausman & John L. Neufeld, *How Politics, Economics, & Institutions Shaped Electric Utility Regulation in The United States: 1879-2009*, 53 Bus. Hist. 723 (2011) 8

William Kolasky, *Antitrust Litigation: What's Changed in Twenty-Five Years*, 27 Antitrust (Fall 2012) 19

INTEREST OF *AMICI CURIAE*[1]

The American Public Power Association ("APPA") is the service organization representing the interests of not-for-profit, public power utilities throughout the United States. More than 2,000 public power utilities, doing business in every state except Hawaii, provide electric service to approximately 49 million consumers, or about 15 percent of the nation's electric customers.

The Large Public Power Council ("LPPC") is an organization of twenty-six of the nation's largest public power systems.[2] The member utilities are locally governed and directly accountable to consumers. They provide electricity across twelve states, from Washington State to Florida, and from Arizona to New York, as well as the island of Puerto Rico. LPPC member utilities provide low-cost power to more than 30 million people – about 10 percent of the U.S. population. Collectively, LPPC member utilities own and operate more than 71,000 megawatts of generation capacity and over 30,000 circuit miles of high-voltage transmission lines.

APPA, LPPC, and their members have a strong interest in the scope of state-action immunity, including the immediate appealability of its denial. APPA and LPPC represent not-for-profit, public power utilities.

---

[1] Pursuant to Rule 37.6, APPA and LPPC (*"amici"*) affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* made a monetary contribution intended to fund the preparation or submission of this brief. All parties consent to the filing of this brief.

[2] Each LPPC member is also a member of APPA.

These entities are either departments of city or town governments, or are special purpose governmental entities. They provide power, and in many cases water and other public services, to millions of Americans. They are run by elected or appointed public servants. They serve public goals set forth by the states in which they operate. In the areas served by public power utilities, states have decided to displace a for-profit competitive marketplace that federal antitrust laws are designed to regulate and instead to provide low-cost, reliable, and essential services to citizens through these governmental entities.

State-action immunity respects the decision of sovereign states to delegate to these entities the power to take certain actions free of the burden of the antitrust laws. State-action immunity protects public power utilities' ability to meet their public goals, and provide myriad public services. Ensuring that public power utilities can immediately appeal an adverse decision on state-action immunity helps protect these entities' ability to provide low-cost utility services without disruption, and insulates their public leaders' discretion to make reasonable policy decisions and avoid the costs and distractions of protracted litigation.

SUMMARY OF THE ARGUMENT

APPA and LPPC urge the Court to reverse the Ninth Circuit's refusal to treat state-action immunity like similar immunities grounded in state sovereignty for purposes of interlocutory appeal. The question – when a decision withholding state-action immunity for public entities may be appealed – directly impacts APPA and LPPC members and will indirectly affect the public by virtue of the unique role that APPA and LPPC members play in the community.

APPA and LPPC members (also referred to as "public power utilities"[3]) are governmental entities that provide power and other public services to 49 million Americans – services like electricity and water that are essential to everyday life. They advance public-oriented goals that distinguish them from for-profit entities. In light of those public objectives, it is critical that this Court permit public power utilities to be able to appeal an adverse decision on state-action immunity right away, and not bar their ability to appeal until after a trial can be conducted and the district court's judgment on the merits can be issued.

Treating state-action immunity as immediately appealable respects the sovereignty of state governments, which have delegated authority to public power

---

[3] Public power utilities are "not-for-profit electric utilities that are owned, controlled, and operated by state or local governments, primarily by municipalities, for the benefit of their own citizens." Alan Richardson & John Kelly, *The Relevance and Importance of Public Power in the United States*, 19 Nat. Resources & Env't 54, 54 (2005).

utilities to administer important services. It also avoids negative practical consequences, such as unnecessary and significant litigation costs for what are often small governmental entities, and a deleterious effect on public power utilities' public-servant leaders. Forcing public power utilities to litigate antitrust claims before appellate review of adverse decisions on state-action immunity will undermine the purpose of the doctrine and hamper public power utilities' ability to meet their public objectives.

ARGUMENT

I. PUBLIC POWER UTILITIES SERVE PUBLIC OBJECTIVES AND PROVIDE CRITICAL SERVICES.

State-action immunity allows states to favor public objectives over free-market competition. This Court established the doctrine of state-action immunity in *Parker v. Brown*, 317 U.S. 341 (1943), holding that federal antitrust law does not bar states from engaging in allegedly anti-competitive conduct "as an act of government." *Id.* at 325. This doctrine arises out of "the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Cmty. Commc'ns Co. v. City of Boulder, Colo.*, 455 U.S. 40, 53 (1982). The doctrine allows states in certain "spheres" to "impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives." *N.C. State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101,

1109 (2015). In recognizing the doctrine, this Court acknowledged the impropriety of forcing states to conform each of their laws and policies "to the mandates of the Sherman Act," noting that doing so would "impose an impermissible burden on the States' power to regulate." *Id.* This doctrine applies not just to states themselves, but to local governmental entities when they "act[] pursuant to a clearly articulated and affirmatively expressed state policy to displace competition." *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 219 (2013).

The advent of public power pre-dated *Parker v. Brown* and the Sherman Act itself. Alan Richardson & John Kelly, *The Relevance and Importance of Public Power in the United States*, 19 Nat. Resources & Env't 54, 54 (2005) (describing the first examples in the United States of public power utilities in 1880). Courts have applied the state-action immunity doctrine to public power utilities. *See Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 770 F.2d 833, 838 (9th Cir. 1985) (concluding that the public power utility serving the Sacramento, California area was "immune from antitrust liability based on the state action immunity doctrine"). Indeed, nowhere is this doctrine's aim to "achieve public objectives," *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1109, more relevant than in the work of public power utilities. *See Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 401-02 (9th Cir. 1991) (listing examples of state action immunity granted to public utilities to show that the court has "been more willing to find that a statute

displaces competition with regulation if the statute concerns a utility"). The question of whether state-action immunity bars suit against public power utilities and the timing of appellate review is crucial to APPA and LPPC members – and the communities they serve – because of the public objectives that guide them and the critical public services they provide.

A. Public power utilities are governmental entities that serve a public purpose.

State-action immunity allows public power utilities to focus on "public objectives," *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1109, and APPA and LPPC members have many. APPA members vary in size from large providers – such as the Los Angeles Department of Water & Power in Los Angeles, California – to small entities – like Madison Electric in Madison, Maine. *See* Our Members, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/our-members. Twenty-six of the largest public power systems make up the membership of LPPC. *See* Our Members, Large Pub. Power Council (2017), http://www.lppc.org/who-we-are/our-members.

Public power utilities are one of the four primary types of electric utilities in the United States. The other three are investor-owned utilities (i.e., large, for-profit companies), electrical cooperatives, and federal power entities. *See, e.g.*, John E. Kwoka, Jr., *Governance Alternatives & Pricing in the U.S. Electric Power Industry*, 18 J.L. Econ. & Org. 278, 278-79 (2002).

Public power utilities serve roughly 15 percent of the nation's electricity customers. Stats and Facts, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power/stats-and-facts.

The public power utilities that are members of APPA and LPPC are either departments of city or town governments, or are special purpose governmental entities created or commanded by state or municipal law to provide utility services. Public Power, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power ("Like public schools and libraries, public power utilities are owned by the community and run as a division of local government."); *see also Jordan v. Zidel*, 191 A.2d 178, 180 (N.J. 1963) (stating that it is clear that a municipal utility's authority "is but a means of discharging local governmental responsibilities for the welfare of inhabitants of the community"); Richardson & Kelly, *The Relevance and Importance of Public Power in the United States*, at 54 (public power utilities are "not-for-profit electric utilities that are owned, controlled, and operated by state or local governments, primarily by municipalities, for the benefit of their own citizens").

By their very nature, these governmental entities serve public objectives beyond the Sherman Act's reach. *See Parker*, 317 U.S. at 351 (noting that the purpose of the Sherman Antitrust Act "was to suppress combinations to restrain competition and attempts to monopolize by *individuals and corporations*" (emphasis added)). Their history is different. Public power utilities were developed not to maximize profits or

compete for customers, but to provide electricity service to people who needed it.[4] Public power utilities aimed to expand electrification to rural areas in particular, regions of the country that private, for-profit utilities left unserved. Richard Rudolph & Scott Ridley, *Power Struggle: The Hundred-Year War over Electricity* 37-38 (1986).

By 1917, utility-generated electricity was available to only slightly more than 60 percent of the United States population. Because private utilities had largely neglected rural areas, electricity was rarely available to rural residents. William J. Hausman & John L. Neufeld, *How Politics, Economics, & Institutions Shaped Electric Utility Regulation in The United States: 1879-2009*, 53 Bus. Hist. 723, 726, 733 (2011). With support from President Franklin D. Roosevelt's New Deal, electric utility service reached close to 84 percent of the population by 1940, thanks in part to the work of public power utilities to expand access. *Id.*; Twentieth Century Fund, Electric Power and Government Policy 3 (1947).

The public-oriented nature of these governmental utilities is also borne out in the amount of revenue they generate and how they use it. Because public power

---

[4] In places like California and Arizona, some public power utilities started by offering water, and only later offered electricity. *See Pac. Gas & Elec. Co. v. Sacramento Mun. Util. Dist.*, 92 F.2d 365, 368 (9th Cir. 1937) (noting that public utilities providing electricity had "become as interwoven in the lives of California men and women as . . . the function of supplying them with domestic water").

utilities do not have shareholders, none of the utility revenues need to be devoted to paying dividends or otherwise distributing profit to equity investors. Kwoka, Jr., *Governance Alternatives & Pricing in the U.S. Electric Power Industry*, at 280 (noting that, unlike public power utilities, private, investor-owned utilities are "ultimately responsible to . . . shareholders and therefore should pursue profit maximization"). They are also democratically governed, by public servants who are either appointed or elected and, in the latter case, are directly accountable to the public. *Id.* at 279-81. The cost-based rates charged by public power utilities are often lower than those charged by investor-owned utilities. *Id.* at 278-94 (subjecting U.S. electricity rates to a comprehensive pricing model and controlling for other factors, and concluding that public ownership of utilities is associated with lower utility rates); *see also* Public Power, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power ("Homes powered by public power utilities pay nearly 15 percent less than homes powered by private utilities."). And scholars argue that the evidence shows that this reduction in price is not simply a coincidence; it is directly related to the different way in which public power utilities – in particular those with elected leaders – are governed. *See* Kwoka, Jr., *Governance Alternatives & Pricing in the U.S. Electric Power Industry*, at 293 ("[T]his study makes clear that characteristics of governance structures and operations that expose decision makers to greater popular pressure and that make them more accountable generally serve to reduce prices.").

In addition to providing low-cost electricity service, public power utilities often make important contributions to other governmental functions in their communities. In 2014, for example, public power utilities "contributed 5.6 percent of [their] electric operating revenues back to the communities they serve." Public Power Pays Back at 3, Am. Pub. Power Ass'n (Apr. 2016) (hereinafter Public Power Pays Back), http://appanet.files.cms-plus.com//PDFs/PublicPowerPaysBack2014.pdf; *see also* Richardson & Kelly, *The Relevance and Importance of Public Power in the United States*, at 58 (noting that public power utilities make significant payments in lieu of taxes to state and local governments, which are similar in amount to the taxes paid by private, investor-owned utilities). This revenue contribution comes in a variety of forms, from discounted services, to general payments to the local government, to taxes. Examples of how public power utilities use this revenue for the public good include additional streetlighting; lighting for municipal buildings; traffic signals; and recreational facilities. Public Power Pays Back at 7-8. The utility owned by the City of Anoka, Minnesota, for example, generates $25 million in revenue each year, and roughly 10 percent of that revenue is directed back to boost the city's operating funds. Anoka Mun. Util., http://www.anokaelectric.govoffice3.com/ (last visited Jan. 18, 2018). In short, public power utilities are distinct from private enterprise because of the public objectives that govern them, their history, the rates they charge, and how they use any net operating revenue.

B. Public power utilities provide critical public services.

Not only do public power utilities – at a general level – embody the state-articulated "public objectives" that state-action immunity is meant to protect, *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1109, they also provide essential services to which the public should have stable and reliable access. Different from the products and services that make up most of what American private industry offers, electricity services are uniquely essential to everyday life and are, consequently, "affected with a public interest." 16 U.S.C. § 824(a) (stating, in Section 201 of the Federal Power Act, the public nature of electricity services); *see also Grason Elec. Co.*, 770 F.2d at 837-38 (noting that the California Constitution allows for the creation of municipal utilities to perform specifically public functions: "*public* works to furnish [a municipality's] inhabitants with light, water, power, heat, transportation or means of communication" (emphasis added)); *State v. City of Austin*, 331 S.W.2d 737, 745 (Tex. 1960) ("Utilities are necessary adjuncts of the public welfare. Their business operations and their property have long been subject to special legislative treatment for many years." (internal quotation marks omitted)).

Public power utilities provide, first and foremost, essential electricity service. Fully 49 million Americans – some 1 in 7 electricity customers – receive their power from public power utilities. In the post-industrial era, defined by appliances, computers, the internet, and cellphones, it is difficult to overstate how

important electricity is to modern life. *See* Lois R. Lupica, *Transitional Losses in the Electric Power Market: A Challenge to the Premises Underlying the Arguments for Compensation*, 52 Rutgers L. Rev. 649, 652 n.6 (2000) ("Electricity is of critical importance in our culture. Electricity is a necessity and there is no close substitute for most of the product provided."). Natural disasters that temporarily eliminate electricity service also show how critical reliable electricity service is to our emergency management systems and public health.

A number of public power utilities also provide domestic water service. A single LPPC/APPA member – the Los Angeles Department of Water & Power – provides water to over 4 million people, through 681,000 active service connections. Water: Facts & Figures, L.A. Dep't of Water & Power, https://www.ladwp.com/ladwp/faces/ladwp/aboutus/a-water/a-w-factandfigures?_adf.ctrl-state=1br8pf1ntd_4&_afrLoop=1054280876754233 (last visited Jan. 18, 2018). These utility services are "essential to the protection of [the public's] health and safety." *City of Austin*, 331 S.W.2d at 745. And again, as recent natural disasters have demonstrated, without access to dependable clean water, communities struggle.

Some public power utilities also provide other important services, such as wastewater, trash removal, street lighting, street maintenance, gas, and broadband. Owatonna Public Utilities in Minnesota, for example, provides wastewater, natural gas, and streetlighting services, in addition to electricity and water. Owatonna Pub. Utils., http://www.owatonna

utilities.com/ (last visited Jan. 18, 2018). The Coldwater Board of Public Utilities in Michigan provides electricity, water, wastewater, and broadband services (including cable, internet, and phone). Our Services, Coldwater Bd. of Pub. Utils., http://www.coldwater.org/415/Our-Services (last visited Jan. 18, 2018). Hastings Utilities in Nebraska offers electricity, water, natural gas, and wastewater services, and conducts maintenance on street lighting. Rates, Hastings Utils., https://www.hastingsutilities.com/rates/ (last visited Jan. 18, 2018). Idaho Falls Power offers a wide range of services, including electricity, water, trash removal/sanitation, and wastewater. Stop, Start, Move Service, Idaho Falls Power, https://www.idahofalls idaho.gov/268/Stop-Start-Move-Service (last visited Jan. 18, 2018). Bryan Municipal Utilities in Ohio even installs and maintains security lights on existing utility poles for a small monthly fee. Security Lighting, Bryan Mun. Utils., https://www.cityofbryan.net/security-lighting/ (last visited Jan. 18, 2018). Either state government, or the public power utilities themselves – and not the whims of investor demand – determines the services these entities provide to citizens.

State-action immunity's aim of allowing government to engage in allegedly anti-competitive conduct to advance public objectives, *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1109, aligns with states' authorization of public power utilities to provide these essential services. In many parts of the country, where potential profit did not warrant private industry offering these services, state and municipal governments

have acted to ensure that these services are available. State-action immunity protects those decisions from undue intervention under the banner of federal antitrust litigation.

II. BARRING STATE-ACTION IMMUNITY APPEALS UNTIL THE END OF TRIAL COURT LITIGATION UNDERMINES THE IMMUNITY'S PURPOSE AND CREATES NEGATIVE CONSEQUENCES FOR THE PUBLIC.

A final determination on the applicability of state-action immunity to a public power utility defendant should be made at the outset of litigation. Requiring public power utilities to respond to discovery and defend themselves in full-blown trials on antitrust claims before allowing appeal of an adverse trial court decision on state-action immunity questions will undermine the doctrine's purpose and cause negative consequences for public power utilities and the communities they serve.

A. Barring immediate appeal here undermines state-action immunity's purpose of resolving conflicts between federalism and antitrust principles.

State-action immunity's purpose is to "resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace." *S. Motor Carriers Rate*

Conference, Inc. v. United States, 471 U.S. 48, 61 (1985). The doctrine respects the "significant measure of sovereignty" afforded states "under our Constitution." *Cmty. Commc'ns Co.*, 455 U.S. at 53. If public power utilities – which have been created by sovereign states and delegated authority to provide public services – are forced to litigate antitrust cases to final judgment before being able to appeal an adverse decision regarding state-action immunity, then the doctrine's goal of acknowledging and respecting state sovereignty is not being met.

In the case of public power utilities, states have made an important choice, that is, to delegate authority to political subdivisions to achieve public goals by providing utility services in the geographic regions they serve. As this Court noted in *City of Trenton v. State of New Jersey*, 262 U.S. 182, 186 (1923), when discussing the state's decision to provide water: "Power to own, maintain, and operate public utilities, such as waterworks, gas and electric plants, street railway systems, public markets, and the like is frequently conferred by the states upon their cities and other political subdivisions." *See also City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 437 (2002) ("The principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State." (internal quotation marks omitted)). Across the country, thousands of public power utilities exercise delegated state authority to administer services that are essential to daily human life. States have made this

type of delegation to ensure these services are provided in a stable, reliable, and efficient manner, at a reasonable cost, especially where private providers may not be inclined to serve. *See Big Country Foods, Inc. v. Bd. of Educ. of Anchorage School Dist., Anchorage, Alaska*, 952 F.2d 1173, 1179 (9th Cir. 1992) ("A state should not be penalized for exercising its power through smaller, localized units; local control fosters both administrative efficiency and democratic governance.").

This choice on the part of states demands respect under our dual system of governance, and under the state-action immunity doctrine that is designed to respect state sovereignty. *Cmty. Commc'ns Co.*, 455 U.S. at 53. Hauling public power utilities and their officers into court, and forcing them to litigate complex and expensive antitrust cases for years before they can obtain appellate review of a determination that state-action immunity does not apply, affords no such respect. *See Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391, 1395 (5th Cir. 1996) ("One of the primary justifications of state action immunity is the same as that of Eleventh Amendment immunity – to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." (internal quotation marks omitted)); *see also Preferred Commc'ns, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1413-14 (9th Cir. 1985) (stating that if the state-action immunity doctrine were unavailable absent "[n]arrowly drawn, explicit delegation" of legislative authorization to municipalities, then "the specter of antitrust liability would unduly hamper the state's ability to

allocate governmental authority between itself and its subdivisions"). It undermines a state's choice regarding these essential services, and it effectively neuters the protections state-action immunity is meant to provide.

B. Delay will have negative consequences for public power utilities, and the public.

It is critical that public power utilities be able to resolve the application of state-action immunity at an early stage in litigation because of the practical impact of doing otherwise. Public power utilities are "not-for-profit electric utilities that are owned, controlled, and operated by state or local governments, primarily by municipalities, for the benefit of their own citizens." Richardson & Kelly, *The Relevance and Importance of Public Power in the United States*, at 54; *see also* Public Power, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power. What little net operating revenue they may have is re-directed to their authorizing governmental units, or to their customers in the form of lower-cost services. Public Power Pays Back at 3; *see also* Richardson & Kelly, *The Relevance and Importance of Public Power in the United States*, at 58 (noting the significant payments in lieu of taxes that public power utilities make to state or local governments). The significant costs of defending a full trial on antitrust claims would be borne entirely by the citizens these public power utilities serve.

For public power utilities, costly litigation will necessarily draw resources away from the public services these utilities provide. *See* Mike Maciag, *From Police Shootings to Playground Injuries, Lawsuits Drain Cities' Budgets*, Governing (Nov. 2016), *available at* http://www.governing.com/topics/finance/gov-government-lawsuits-settlements.html (stating that the cost of fighting claims in court can lead cities to settlement, and arguing that litigation costs will make up a higher percentage of cities' budgets in years to come); Roger L. Kemp, Managing America's Cities: A Handbook for Local Government Productivity 102 (2007) (noting the tendency of local governments to settle lawsuits due to the significant cost of continuing litigation through trial, regardless of the legal merits of the case). Forcing these entities to litigate to the end of a case before determining if state-action immunity applies will waste significant resources, and ultimately hurt utility customers.

This is especially true in the context of antitrust litigation. As this Court recognized in *Bell Atlantic Corp. v. Twombly*, "proceeding to antitrust discovery can be expensive." 550 U.S. 544, 558 (2007). In support, this Court cited the discussion of "the unusually high cost of discovery in antitrust cases" described in William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887, 1898-1899 (2003). *Twombly*, 550 U.S. at 558. Even when dissenting in *Twombly*, Justice Stevens, who arrived at the Court as

an authority on antitrust litigation[6] acknowledged that "[p]rivate antitrust litigation can be enormously expensive[.]" *Twombly*, 550 U.S. at 573 (Stevens, J., dissenting); *see also Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 317 (7th Cir. 2012) ("Antitrust suits are notoriously costly."); *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 904 (6th Cir. 2009) (noting the "dilemma of the extensive litigation costs associated with prosecuting and defending antitrust lawsuits"); *Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers*, 536 F.3d 68, 77 n.7 (1st Cir. 2008) ("[A]ntitrust suits ordinarily entail massive discovery and are expensive to defend."). Antitrust litigation is routinely cited as one of the most complex and expensive types of litigation in the United States. *See* Manual for Complex Litigation, Fourth § 30, p. 519 (2004) (cited in *Twombly*, 550 U.S. at 559); William Kolasky, *Antitrust Litigation: What's Changed in Twenty-Five Years*, 27 Antitrust (Fall 2012) (noting the increasingly burdensome costs of e-discovery in antitrust litigation). These high antitrust litigation costs exacerbate the problem of forcing public power utilities to reach the end of trial court litigation before allowing appellate court review on the question of whether state-action immunity should have saved them from suit in the first instance.

---

[6] "Justice Stevens was a prominent antitrust practitioner, lecturer and author before he was even Justice Stevens." Robert A. Skitol and Kennedy M. Vorrasi, *Justice Stevens' Antitrust Legacy*, 24 Antitrust No. 3, at 33 (Summer 2010).

The absence of interlocutory appellate jurisdiction to review and reverse denials of state-action immunity has imposed considerable hardship on defendants that were actually entitled to the immunity. For example, in 1988, the Tenth Circuit held, following final judgment, that an electric utility was entitled to state-action immunity. *Lease Lights, Inc. v. Pub. Serv. Co. of Okla.*, 849 F.2d 1330, 1331 (10th Cir. 1988).[6] The lawsuit had been filed eleven years earlier, in 1977. *Id.* at 1332. Four years into the case, the immune defendant won the first trial on grounds that were vacated, then lost the second trial seven years into the case. *Id.* In April 2001, in another antitrust suit arising in the electric utility context, the Tenth Circuit ruled that an antitrust suit should have been dismissed under the state-action doctrine. *Trigen-Okla. City Energy Corp. v. Oklahoma Gas & Elec. Co.*, 244 F.3d 1220, 1224-25 (10th Cir. 2001) ("[T]he state action doctrine mandates the dismissal of the federal antitrust claims. . . ."). This ruling occurred nearly six years after the suit was filed (in September 1996), *id.* at 1224, and over two years after the immune defendant was on the receiving end of a plaintiff's judgment, *id.* By contrast, in a case where the district court certified its denial of state-action immunity for

---

[6] In *Lease Lights* and in *Trigen-Oklahoma City Energy Corp.*, the defendants that ultimately received state-action immunity were not public entities but private ones acting subject to state regulation. However, the cases are meaningful because they demonstrate how the absence of a right of interlocutory review can force a defendant that is entitled to state-action immunity to defend itself for many years, before it can ultimately vindicate itself based on the immunity.

interlocutory appeal under 28 U.S.C. Section 1292(b), the appellate decision enforcing the immunity was issued the year following the district court's decision. *See Grason Elec. Co.*, 770 F.2d at 835-38.[7]

The burden of litigating an entire antitrust case would be especially acute and overwhelming for the many public power utilities that are small organizations providing services to small cities and towns. The majority of APPA members provide power and other services to small communities, yet nevertheless face the specter of antitrust litigation like this case. *See* Public Power, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power ("Most public power utilities have fewer than 4,000 customers. . . ."). Specifically, two-thirds of APPA members serve communities with 4,000 or less customers, and within that group, half serve communities with less than 1,000 customers. *See* Am. Pub. Power Ass'n, 2016-17 Annual Directory & Statistical Report 63 (2017). And public power utilities with the least annual revenue, on average, provide a greater percentage of that revenue back to the smaller communities they serve as payments and contributions. Public Power Pays Back at 4. The

---

[7] Outside of the utility context, the Eleventh Circuit (which recognizes a right of interlocutory appeal from denials of state-action immunity) reversed a denial of the immunity fourteen months after the suit was filed. *See Danner Const. Co. v. Hillsborough Cty.*, No. 8:09-CV-650-T-17TBM, 2009 WL 2144716, at *1 (M.D. Fla. July 15, 2009) (noting the suit was filed April 7, 2009), *rev'd and remanded sub nom. Danner Const. Co. v. Hillsborough Cty., Fla.*, 608 F.3d 809 (11th Cir. 2010) (reversing the denial of state-action immunity, on June 9, 2010).

difference between litigating to the end of a case at the trial court level, versus appealing immediately to obtain the protection of state-action immunity, could have an especially significant impact on small public power utilities and the customers and communities they serve.

The burden of unnecessarily litigating to the end of a case before determining that state-action immunity applies also could discourage public service in the governance and management of public power utilities. Some public power utilities have elected governing boards, such as petitioner here and the municipal utility district in *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193, 196 (2009), while the leaders of others are appointed by elected officials, such as the municipally-owned utility in *Johnson v. Princeton Public Utilities Commission*, 899 N.W.2d 860, 867 (Minn. Ct. App. 2017). *See, e.g.*, Ames Iowa Municipal Code § 28.701(3) (providing for appointment of public power utility board members by mayor with approval of city council); Redding California Code of Ordinances § 14.22.170(A) (stating that city council establishes electric utility rates); *see also* 2015 Governance Survey at 1-2, Am. Pub. Power Ass'n (May 2015), https://www.csu.org/CSUDocuments/appagovernancesurvey2015.pdf (noting that a majority of surveyed public power utilities are governed by elected city councils, and that the remainder are governed by independent boards, which can be either elected or appointed). The citizen-governance model is important because, in practical terms, enforcement of state-action

immunity rescues certain defendants who are caught between a rock and a hard place. Such defendants were responsible for carrying out a "clearly expressed state policy," *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40-41 (1985), yet they are being sued because their authorized conduct was allegedly anticompetitive. If a district court fails to apply the immunity under those circumstances, and the court of appeals is unable to review that decision until all district court proceedings end, that experience could have a chilling effect on the willingness of citizen-volunteers to continue their public service.

Even for those that are not deterred from serving, the weight and distraction of lengthy antitrust litigation will, at a minimum, impact the policy-making decisions of public power utilities' leaders. As the article on antitrust litigation cited by this Court in *Twombly* explains, "[a]necdotal evidence suggests that defendants unable to shift the costs of complying with requests for electronic documents feel pressured to settle lawsuits to avoid the discovery costs." Wagener, *supra*, at 1898; *see also* Brian T. Fitzpatrick, *Twombly and Iqbal Reconsidered*, 87 Notre Dame L. Rev. 1621, 1638-41 (2012) (noting that, even for large corporate defendants, the threat of the costs associated with extensive discovery often force pre-discovery settlement). Instead of exercising the discretion and authority delegated to them by the relevant state, and providing services in a way that achieves public goals, public power utility leaders may make defensive decisions

that protect against the added burdens of antitrust litigation.

Finally, the costs of protracted antitrust litigation will be borne entirely by the citizen-customers public power utilities serve. With private utilities, shareholders may bear the cost of litigation through reduced profits. Public power utilities have no shareholders; all of the costs of litigation will ultimately be shouldered by the citizen-customers they serve, whether through the rates they pay, reduced services and use of revenue for other public goals, or both.

CONCLUSION

The practical impact of putting off appeal of a state-action immunity denial until the end of trial court litigation will be to impose the risk of massive litigation costs on public power utilities, with the potential to deter and distract their leaders. Public power utilities are governmental entities that serve important public purposes, and they provide critical public services to the communities that they serve. The Court should reverse the Ninth Circuit's decision and permit interlocutory appeal by a public entity of a decision to deny state action immunity before trial. Such a ruling would advance the principles underlying the Court's establishment of state-action immunity, and would reasonably apply those principles to public

power utilities providing essential services to millions of Americans nationwide.

Respectfully submitted,

JOHN M. BAKER
Counsel of Record
JENNY GASSMAN-PINES
CHRISTOPHER L. SCHMITTER
CAITLINROSE H. FISHER
GREENE ESPEL PLLP
222 S. Ninth Street, Suite 2200
Minneapolis, MN 55402
(612) 373-0830
jbaker@greeneespel.com

Counsel for Amici Curiae

No. 17-368

In The Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

v.

TESLA ENERGY OPERATIONS, INC., FKA SOLARCITY CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CENTER FOR BIOLOGICAL DIVERSITY, FOOD & WATER WATCH, FRIENDS OF THE EARTH, GREENPEACE, INC., INSTITUTE FOR LOCAL SELF-RELIANCE, AND NC WARN, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

HOWARD M. CRYSTAL
Counsel of Record
ANCHUN JEAN SU
CENTER FOR BIOLOGICAL DIVERSITY
1411 K Street, N.W., Suite 1300
Washington, DC 20005
(202) 849-8397
hcrystal@biologicaldiversity.org

Counsel for Amici Curiae

February 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. SRP IS NOT ENTITLED TO AN INTERLOCUTORY APPEAL BECAUSE ITS STATE-ACTION DEFENSE REQUIRES RESOLUTION OF FACTUAL ISSUES CLOSELY TIED TO THE MERITS 3

A. Because SRP Must Demonstrate Active Supervision, Its State-Action Defense Requires The Resolution Of Facts Closely Tied To The Merits 4

B. In Light Of The Many Arizona Policies Supporting The Expansion Of Rooftop Solar Development, SRP's Claimed Authorization For Its Discriminatory Rates Is Also Closely Tied To The Merits 10

II. THE FOUNDATIONAL PREMISES OF SRP'S ASSERTED RIGHT TO AN UNBOUNDED MONOPOLY DO NOT HOLD IN THE AGE OF DISTRIBUTED SOLAR COMPETITION 16

A. The Premise That Electricity Monopolies Necessarily Serve The Public Interest Has Been Undermined By Public Policy And Technology 17

TABLE OF CONTENTS – Continued

Page

B. Monopoly Power Companies Opposing Distributed Solar Generation Are Acting Against The Public Interest 21

1. Discriminatory rates against rooftop solar are widespread..... 21

2. Discriminatory rates against rooftop solar harm consumers and the environment..... 24

C. Allowing Public Power Companies To Obtain Interlocutory Appeal Of State-Action Immunity Rulings Will Only Encourage More Discriminatory Rates Contrary To The Public Interest 27

CONCLUSION..... 30

DESCRIPTION OF *AMICI CURIAE* A-1

TABLE OF AUTHORITIES

Page

CASES

Alabama Power Co. v. Ickes, 302 U.S. 464 (1938).....29

Allco Fin., Ltd. v. Klee, 861 F.3d 82 (2d Cir. 2017) 11

Arizona Corp. Comm'n v. Arizona ex rel. Grant Woods, 171 Ariz. 286 (1992).....13

Ball v. James, 451 U.S. 355 (1981) 2, 5, 6, 7, 8

City & Cnty. of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015).....11

Community Comms. Co. v. Boulder, 455 U.S. 40 (1982).....10

Cost Management Svcs., Inc. v. Wash. Nat. Gas Co., 99 F.3d 937 (9th Cir. 1996).....9

FERC v. Electric Power Supply Ass'n, 136 S. Ct. 760 (2016).....19

FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216 (2013).....10, 16

FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992) 5, 9

Garden Lakes Cmty. Ass'n v. Madigan, 204 Ariz. 238 (Ariz. Ct. App. 2003).....11

Grason Elec. Co. v. Sacramento Mun. Util. Dist., 770 F.2d 833 (9th Cir. 1985).....7

Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016).....17

Johnson v. Jones, 515 U.S. 304 (1995).....4, 10

Kay Elec. Coop. v. Newkirk, 647 F.3d 1039 (10th Cir. 2011) 13

TABLE OF AUTHORITIES – Continued

Page

Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397 (9th Cir. 1992) 7

Mesa v. Salt River Project Agric. Improvement & Power Dist., 373 P.2d 722 (Ariz. 1961) 8

Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009) 28

Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty., 554 U.S. 527 (2008) 19

N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015) ..... *passim*

New York v. FERC, 535 U.S. 1 (2002) 20

Niedner v. Salt River Project Agric. Improvement & Power Dist., 121 Ariz. 331 (1979) 6

Ortiz v. Jordan, 562 U.S. 180 (2011) 4

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 28

Parker v. Brown, 317 U.S. 341 (1943) ..... *passim*

Smyth v. Ames, 169 U.S. 466 (1898) 19

Tenn. Electric Power Co. v. Tenn. Valley Auth., 306 U.S. 118 (1939) 29

Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994) 11

Town of Hallie v. Eau Claire, 471 U.S. 34 (1985) 4, 5, 7

Will v. Haddock, 546 U.S. 345 (2006) 9, 10, 16

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Pub. L. No. 95-617, 92 Stat. 3117 20

Pub. L. No. 102-486, 106 Stat. 2776 20

Ariz. Rev. Stat. § 30-800 (2017) 13

Ariz. Rev. Stat. § 30-805 (2017) 14

Ariz. Rev. Stat. § 40-332 (2017) 13

Ariz. Rev. Stat. § 42-5061 (2017) 12

Ariz. Rev. Stat. § 42-11054 (2017) 12

Ariz. Rev. Stat. § 43-1083 (2017) 12

REGULATIONS

Ariz. Admin. Code § R14-2-703 (2017) 11

Ariz. Admin. Code § R14-2-1801 (2017) 11

Ariz. Admin. Code § R14-2-2301 (2017) 12

ADMINISTRATIVE AND EXECUTIVE MATERIAL

Ariz. Exec. Order No. 2006-13 (Sept. 7, 2006), *available at* http://azmemory.azlibrary.gov/cdm/ref/collection/execorders/id/507 15

Ariz. Exec. Order No. 2010-006 (July 1, 2010), *available at* http://azmemory.azlibrary.gov/cdm/ref/collection/execorders/id/690 14

Bd. of Dir. of Sacramento Mun. Util. Dis., Resolution No. 15-07-06 (Sacramento Mun. Util. Dist. July 16, 2015) 23

TABLE OF AUTHORITIES – Continued

Page

Conn. Light & Power, Docket No. 14-05-06 (Conn. Pub. Util. Regulatory Authority Dec. 17, 2014) 23

Kan. City Power & Light, Docket No. 15-WSEE-115-RTS (Mo. Corp. Comm'n Sep. 24, 2015) 23

NSTAR Elec. Co., D.P.U. 17-05-B (Mass. Dept. of Pub. Util. Jan. 5, 2018) 23

Wis. Electric Power Co., Docket No. 5-UR-107 (Wis. Public Service Comm'n Dec. 23, 2014) 24

OTHER AUTHORITIES

Am. Lung Ass'n, *State of the Air* (2017), *available at* http://www.lung.org/assets/documents/healthy-air/state-of-the-air/state-of-the-air-2017.pdf 25

Ari Peskoe, *Unjust, Unreasonable, and Unduly Discriminatory: Electric Utility Rates and the Campaign Against Rooftop Solar*, 11 Tex. J. Oil Gas & Energy L. 211 (2016) 20, 21

Ariz. Climate Change Advisory Group, *Climate Change Action Plan* (2006), *available at* http://azmemory.azlibrary.gov/cdm/ref/collection/statepubs/id/3104 15

Galen Barbose, Lawrence Berkeley Nat'l Lab., *Putting the Potential Rate Impacts of Distributed Solar into Context* (2017), *available at* https://emp.lbl.gov/sites/default/files/lbnl-1007060.pdf 13

TABLE OF AUTHORITIES – Continued

Page

Gideon Weissman & Brett Fanshaw, *Shining Rewards: The Value of Rooftop Solar Power for Consumers and Society* (2016), *available at* https://environmentamerica.org/sites/environment/files/reports/AME%20ShiningRewards%20Rpt%20Oct16%201.1.pdf 24

Jerry Melillo et al., U.S. Global Change Research Program, *Climate Change Impacts in the United States: The Third National Climate Assessment* (2014), *available at* http://s3.amazonaws.com/nca2014/low/NCA3_Climate_Change_Impacts_in_the_United%20States_LowRes.pdf?download=1 ..... 26, 27

John E. Kwoka, Jr., *Governance Alternatives & Pricing in the U.S. Electric Power Industry*, 18 J.L. Econ. & Org. 278 (2002) 7

John Farrell, Inst. for Local Self-Reliance, *Is Bigger Best in Renewable Energy?* (2016), *available at* https://ilsr.org/wp-content/uploads/2016/12/Is-Bigger-Best-in-Renewable-Energy-Report-Final.pdf 20

Local Clean Energy All. & Center for Social Inclusion, *Democratizing Our Energy Future* (2015), *available at* http://www.localcleanenergy.org/files/Climate%20Justice%20Energy%20Platform.pdf 25

TABLE OF AUTHORITIES – Continued

Page

Mark Muro & Devashree Saha, *Rooftop Solar: Net Metering is a Net Benefit*, Brookings Institution (May 23, 2016), *available at* https://www.brookings.edu/research/rooftop-solar-net-metering-is-a-net-benefit/ 24

Michael Mann et al., *What We Know About the Climate Change-Hurricane Connection*, Scientific American (Sept. 8, 2017), *available at* https://blogs.scientificamerican.com/observations/what-we-know-about-the-climate-change-hurricane-connection/ 27

Michael Wara, *Competition at the Grid Edge: Innovation and Antitrust Law in the Electricity Sector*, 25 N.Y.U. Envtl. L.J. 176 (2017).....21, 22

N.C. Clean Energy Tech. Ctr., *Find Policies & Incentives by State*, *available at* http://www.dsireusa.org/ 11

N.C. Clean Energy Tech. Ctr., *The 50 States of Solar Report: Q4 2017 and 2017 Annual Report* (2018), *available at* https://ncleantech.ncsu.edu/wp-content/uploads/Q4-17_SolarExecSummary_Final.pdf 22

National Ass'n for the Advancement of Colored People & Clean Air Task Force, *Fumes Across the Fence-Line: The Health Impacts of Air Pollution from Oil and Gas Facilities* (2017), *available at* http://www.naacp.org/wp-content/uploads/2017/11/Fumes-Across-the-Fence-Line_NAACP_CATF.pdf 25

TABLE OF AUTHORITIES – Continued

Page

National Conference of State Legislatures, *State Policies for Power Purchase Agreements, available at* http://www.ncsl.org/research/energy/state-policies-for-purchase-agreements.aspx.....11

National Conference of State Legislatures, *State Net Metering Policies, available at* http://www.ncsl.org/research/energy/net-metering-policy-overview-and-state-legislative-updates.aspx.....12

Paul Garfield & Wallace Lovejoy, *Public Utility Economics* (1964) 18

Peter Gagnon et al., Nat'l Renewable Energy Lab., *Rooftop Solar Photovoltaic Technical Potential in the U.S.: A Detailed Assessment* (2016), *available at* https://www.nrel.gov/docs/fy16osti/65298.pdf.....15

Robert Anglen, *SRP Spends Millions on Executive Education Perks*, USA Today (Feb. 6, 2015), *available at* https://www.usatoday.com/story/money/business/2015/02/06/srp-spends-millions-executive-education-perks/22964871/.....7

Santee Cooper, Distributed Generation Rider DG-17 (2015), *available at* https://www.santeecooper.com/pdfs/rates/ratesadjustment/dg-17-rider.pdf.....23

Stephen Breyer, *Regulation and Its Reform* (1982).....18

TABLE OF AUTHORITIES – Continued

Page

U.S. Energy Info. Admin., Electric Power Monthly, Table 1.3.b and Table 1.17.b (November 2017), *available at* https://www.eia.gov/electricity/monthly/current_month/epm.pdf.....15

U.S. Energy Info. Admin., *Electricity Explained* (May 10, 2017), *available at* https://www.eia.gov/energyexplained/index.cfm?page=electricity_in_the_united_states.....26

U.S. Envtl. Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2015* (2017), *available at* https://www.epa.gov/sites/production/files/2017-02/documents/2017_executive_summary.pdf.....26

W.M. Warwick, U.S. Department of Energy, *A Primer on Electric Utilities, Deregulation, and Restructuring of U.S. Electricity Markets* 2.0 (2002), *available at* https://www.pnnl.gov/main/publications/external/technical_reports/PNNL-13906.pdf.....18

INTERESTS OF *AMICI CURIAE*

Amici – as further described in the Addendum – are leading advocacy organizations working toward a just energy transition, from a fossil fuel-based economy to a renewable energy system, in order to combat climate change and protect the health of communities and the planet. Because the rapid expansion of distributed solar generation is central to this effort, *Amici* are concerned with public power companies like the Salt River Project Agricultural Improvement and Power District ("SRP") exercising monopoly power to discourage consumer adoption of distributed solar systems.[1]

In light of both ever-increasing greenhouse gas concentrations – currently at more than 400 parts-per-million – and the negative impacts of fossil fuel extraction and combustion on public health, wildlife, and the environment, public power companies like SRP should not be permitted to stifle rooftop solar competition in violation of the Sherman Act, which is contrary to the public interest premise on which they were granted monopoly power. Rather, in *Amici's* view, the *Parker v. Brown* state-action defense, 317 U.S. 341 (1943), and interlocutory appeal of *Parker* defense rulings, should not be available as a legal bulwark from antitrust laws for public power companies like SRP to

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* contributed monetarily to its preparation or submission. The parties have consented to the filing of this brief.

discourage captive ratepayers from accessing renewable energy choices.

SUMMARY OF ARGUMENT

The Ninth Circuit correctly concluded that SRP may not invoke the collateral-order doctrine. SRP's *Parker* defense raises factual issues closely tied to the merits, and SRP should not be shielded from antitrust liability for imposing electricity rates that improperly target distributed solar customers and are contrary to the public interest.

1. Because SRP is an "essentially business enterprise[ ]," *Ball v. James*, 451 U.S. 355, 368 (1981), its *Parker* defense cannot succeed unless SRP can demonstrate active state supervision. Since that inquiry turns on "all the circumstances of a case," *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1117 (2015) ("*N.C. Dental*"), it is not completely separate from the merits, and thus not eligible for interlocutory appeal.

2. Arizona has numerous affirmative state policies designed to expand rooftop solar development as a vital component of its clean energy transition. Resolving whether SRP's discriminatory rates are contrary to these state objectives is also closely tied to the merits of SolarCity's antitrust claims.

3. While regulated electricity monopolies were originally created to protect the public interest,

changes in public policy and technology undermine the premise that this model necessarily serves public objectives today. Instead, SRP and other power companies have asserted monopoly power to impose discriminatory rates on distributed solar customers that ultimately harm consumers and the environment, contravening the original purpose of the regulated monopoly. Accordingly, neither the *Parker* defense nor collateral appeal of adverse *Parker* defense rulings should be available for public power entities like SRP to obstruct distributed solar development in violation of antitrust laws.

ARGUMENT

I. SRP IS NOT ENTITLED TO AN INTERLOCUTORY APPEAL BECAUSE ITS STATE-ACTION DEFENSE REQUIRES RESOLUTION OF FACTUAL ISSUES CLOSELY TIED TO THE MERITS

As this Court has emphasized, the federal antitrust laws are a "central safeguard" prohibiting "practices that undermine the free market." *N.C. Dental*, 135 S. Ct. at 1109. Thus, while states themselves may "limit competition to achieve public objectives," *id.*, a reviewing court must closely examine whether an entity created by a state should be entitled to the same freedom. *Id.* at 1111-17. As this case demonstrates, however, that analysis requires resolving both whether the state has exercised sufficient supervision, and whether the particular action being challenged aligns

with the state's policy objectives. These fact-driven determinations are not suitable for collateral appeal.

A. Because SRP Must Demonstrate Active Supervision, Its State-Action Defense Requires The Resolution Of Facts Closely Tied To The Merits

The collateral-order doctrine may not be invoked where disputed questions of fact must be resolved before the issue on appeal can be conclusively resolved. *Ortiz v. Jordan*, 562 U.S. 180, 190-91 (2011); *Johnson v. Jones*, 515 U.S. 304, 314 (1995). This limitation alone is fatal to SRP's appeal, because SRP concedes that the active supervision component of the *Parker* defense may turn on disputed facts. Pet. Br. at 22-23 (noting that the *Parker* defense may turn "on factual grounds, such as where state officials did not exercise their power to supervise the defendant").

SRP seeks to avoid this conundrum by claiming it is not subject to this requirement, and that its appeal therefore falls within a "class of orders" "denying state-action immunity on legal grounds." Pet. Br. at 23-24; *see also id.* at 2 n.1 (citing *Town of Hallie v. Eau Claire*, 471 U.S. 34 (1985)). But SRP does not possess the qualities necessary to be freed from the active state supervision requirement.

As SRP recognizes, the *Hallie* exception to the active supervision requirement applies to municipal governments because they are subject to the electoral accountability necessary to ensure they serve the

public interest as authorized by the state. Pet. Br. at 2 n.1; *Hallie*, 471 U.S. at 46. SRP, however, while labelled a "public power entity," is in actuality an unregulated business monopolist.[2]

This Court's decision in *Ball v. James*, 451 U.S. 355 (1981), makes this absolutely clear. There, the Court considered a constitutional challenge to the eligibility rules for SRP elections, whereby only certain landowners have the right to vote at all (thus eliminating the voting rights of approximately one-third of its electricity customers), and the more property one owns, the more heavily weighted one's vote (thus favoring large landowners). *Id.* at 359.

Relying on SRP's essentially private character, the Court found SRP exempt from the one-person, one-vote principle, explaining that water districts like SRP are "essentially *business enterprises*, created by and chiefly benefiting a specific group of landowners," *id.* at 368

---

[2] The fact that, as SRP stresses, the Arizona Constitution purports to endow it with the "immunities and exemptions granted municipalities," Pet. Br. at 5, is of no moment. This Court has made clear that a state may not immunize a sub-state entity from the Sherman Act by simply "authorizing them to violate it, or by declaring that their action is lawful." *N.C. Dental*, 135 S. Ct. at 1111 (quoting *Parker*, 317 U.S. at 351). Similarly, the Court has explained that, contrary to the argument of the *Amici* National Governors Association, et al. (collectively, "NGA"), Nat'l Governors Ass'n et al. Amicus Brief at 7 n.3 ("NGA Br."), the fact that a state could correct a public power entity's decision is also not an adequate substitute for direct supervision. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992) ("The mere potential for state supervision is not an adequate substitute for a decision by the State.").

(emphasis added), and thus do "not exercise the crucial powers of sovereignty typical of a general purpose unit of government such as a state, county, or municipality." *Id.* at 372 (Powell, J., concurring); *id.* at 366 (explaining SRP does not "administer such normal functions of government as the maintenance of schools, or sanitation, health or welfare service"). Moreover, as regards electricity sales in particular, the Court noted that the "sale of electric power" by SRP is "not for the primary purpose of providing electricity to the public," but rather that SRP uses electricity sales "to defray the expense in irrigating these private lands for personal profit." *Id.* at 368-69 and n.17; *see also Niedner v. Salt River Project Agric. Improvement & Power Dist.*, 121 Ariz. 331 (1979) (rejecting due process claim against SRP on the grounds that it is "a business corporation with attributes of sovereignty which are only incidental, conferred for the purposes of better enabling it to function and accomplish the business and economic purposes for which it was organized").

In short, rather than being "democratically governed" and "directly accountable to the public," as foundational to the majority of public power entities, American Public Power Association et al. Amicus Brief at 9 ("APPA Br."), SRP's structure inherently favors the private interests of large landowners at the expense of the broad base of its electricity consumers, who lack any meaningful accountability mechanism over SRP's decisions. Accordingly, to succeed with a *Parker* defense, SRP must demonstrate it is subject to

active supervision by the State. *See N.C. Dental*, 135 S. Ct. at 1111-12.

SolarCity's antitrust claims here are thus entirely distinguishable from the challenges to public utility districts on which *Amici* American Public Power Association and Large Public Power Council (collectively, "APPA") rely. APPA Br. at 5 (citing *Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 770 F.2d 833, 838 (9th Cir. 1985) (concerning Sacramento's utility); *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 401-02 (9th Cir. 1992) (discussing defense available for utilities on the grounds that "they are usually intensively regulated")). As in *Hallie*, those challenges involved the liability of municipal governments and the power entities they created, entities whose profits were "re-directed to their authorizing governmental units, or to their customers." APPA Br. at 17. This is a far cry from an "essentially business" entity like SRP. *Ball*, 451 U.S. at 368. And it is precisely because of the "risk of self-dealing," *N.C. Dental*, 135 S. Ct. at 1114, that SRP must be subject to active supervision, even while these other traditional public utility entities are not. *Compare* APPA Br. at 9 (discussing how public power companies are "democratically governed" for the purpose of "'expos[ing] decision makers to greater popular pressure'" and making them "'more accountable generally to serve to reduce [electricity] prices'") (quoting John E. Kwoka, Jr., *Governance Alternatives & Pricing in the U.S. Electric Power Industry*, 18 J.L. Econ. & Org. 278, 293 (2002)) *with* Robert Anglen, *SRP Spends Millions on Executive Education Perks*, USA Today (Feb. 6,

2015), *available at* https://www.usatoday.com/story/money/business/2015/02/06/srp-spends-millions-executive-education-perks/22964871/ (discussing SRP's multi-million dollar tuition reimbursement perk for children of SRP executives); *see also, e.g.*, Joint Appendix ("J.A.") at 15-17 (¶¶ 35-38) (discussing $1.6 million SRP paid for sponsorship of major sports teams and other "events and entertainment," and Standard and Poor's praise for SRP's "commitment to strong financial margins").

As for the similar arguments of NGA, this case also does not concern an entity charged with "promoting consumer welfare and [] subject to democratic self-correction by their electorates," NGA Br. at 17, since the SRP electorate is limited to landowners, and weighted to the largest landowners. *Ball*, 451 U.S. at 359. As such, resolving whether the state-action defense applies to SRP also does not implicate these sovereign concerns or legitimate interests. *See also Mesa v. Salt River Project Agric. Improvement & Power Dist.*, 373 P.2d 722, 731 (Ariz. 1961) ("In conducting its ordinary business [SRP] is not exercising governmental or political prerogatives as it is not operated for the direct benefit of the general public. . . .").

In sum, because there is no basis either to consider SRP's decisions as "sovereign actions," *see* State of Tennessee, et al. Amicus Brief at 16, or to assume that SRP is "carrying out a state's economic policies," Pet. Br. at 34, SRP's effort to be freed from the active state supervision requirement must fail. And since resolving whether SRP has been adequately supervised turns on

the resolution of factual issues closely tied to the merits of SolarCity's antitrust claims, SRP's *Parker* defense is thus not eligible for collateral appeal. *Cf. Cost Management Svcs., Inc. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 943 (9th Cir. 1996) ("the question of whether a state has 'actively supervised' a state regulatory policy is a factual one which is inappropriately resolved in the context of a motion to dismiss").

In addition, because SRP is an active market participant in the sale of electricity, a reviewing court will need to pay particularly close attention to whether the State – here Arizona – is exercising the requisite active supervision to entitle SRP to invoke the state-action defense. *See N.C. Dental*, 135 S. Ct. at 1111 ("[l]imits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern"); *FTC v. Ticor*, 504 U.S. at 634 ("where a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State") (citations omitted). Viewing SRP in this light, it is also clear that neither the "efficiency of government and the initiative of its officials," nor any other "particular value of a high order," *Will v. Haddock*, 546 U.S. 345, 352-53 (2006), would be implicated by permitting SolarCity's antitrust claims to proceed before SRP may obtain appellate review concerning its state-action

defense – yet another basis on which to conclude that the collateral-order doctrine is not available.[3]

B. In Light Of The Many Arizona Policies Supporting The Expansion Of Rooftop Solar Development, SRP's Claimed Authorization For Its Discriminatory Rates Is Also Closely Tied To The Merits

In order for public power entities to invoke the *Parker* defense against liability claims, they must demonstrate they are acting "pursuant to a clearly articulated and affirmatively expressed state policy to displace competition." *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 217 (2013) (quoting *Community Comms. Co. v. Boulder*, 455 U.S. 40, 52 (1982)). SRP claims that Arizona's delegation of rate-making power is the only expression of state policy relevant to this inquiry. Pet. Br. at 20. However, the State also has numerous affirmative policies promoting self-generated, renewable electricity – demonstrating that, in fact,

---

[3] SRP repeatedly asserts its appeal raises purely legal issues because a reviewing court assumes the truth of the allegations in SolarCity's complaint. *E.g.*, Pet. Br. at 3. If that alone were sufficient, however, public officials would always be entitled to immediately appeal rulings made on motions to dismiss or for summary judgment – an approach this Court has explicitly rejected. *See, e.g.*, *Will*, 546 U.S. at 353 (rejecting the proposition that collateral appeal is "a matter of right whenever the Government los[es] a motion to dismiss. . . ."); *Jones*, 515 U.S. 304 (summary judgment ruling against officials not immediately appealable).

Arizona has no clearly articulated policy supporting SRP's anti-competitive practices at issue here.[4]

"[T]he Arizona legislature's enactment of laws encouraging the use of solar energy dates back to at least 1974." *Garden Lakes Cmty. Ass'n v. Madigan*, 204 Ariz. 238, 241 (Ariz. Ct. App. 2003). Like many other states, Arizona requires utilities to procure solar generation as part of a Renewable Energy Standard ("RES" or otherwise commonly called Renewable Portfolio Standard ("RPS")). *See* Ariz. Admin. Code § R14-2-703 (2017). Under this program utilities obtain renewable energy credits ("RECs"), including credits from home solar systems, *id.* § R14-2-1801 (2017), et seq. *See Allco Fin., Ltd. v. Klee*, 861 F.3d 82, 92-94 (2d Cir. 2017) (describing how RPS and REC programs generally work); *see also* N.C. Clean Energy Tech. Ctr., *Find Policies & Incentives by State*, *available at* http://www.dsireusa.org/ (showing that almost thirty states have mandatory RPS or other renewable electricity standards); National Conference of State Legislatures, *State Policies for Power Purchase Agreements*,

---

[4] These underlying Arizona state policies – which are highly relevant to whether SRP has the "authorization" necessary to be free from antitrust liability – serve to highlight why this case would be a particularly poor vehicle to find that public entities are always entitled to immediately appeal adverse state-action defense rulings. And since the collateral-order doctrine's applicability does not turn on the facts of a particular case, the Court might on this basis conclude that *certiorari* was improvidently granted. *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994).

available at http://www.ncsl.org/research/energy/state-policies-for-purchase-agreements.aspx (reviewing states that authorize third party power purchase agreements to further foster rooftop solar development).

The Arizona legislature has also adopted tax incentives to encourage solar installation, including: (i) the Solar Energy Credit program, which allows a tax deduction of up to $1,000 invested in a home renewable energy project, Ariz. Rev. Stat. § 43-1083 (2017); (ii) a "solar energy devices" exemption from state sales tax, *id.* § 42-5061 (2017); and (iii) a prohibition on considering solar systems as an element of home value for property tax assessments. *Id.* § 42-11054 (2017). The State was similarly an early adopter of "net metering," which many states provide to compensate distributed solar generators for the excess electricity they return to the grid, offsetting their reliance on the grid at night or when their panels are not making enough energy to serve their needs. *See* Ariz. Admin. Code § R14-2-2301 (2017), et seq.; *see also* National Conference of State Legislatures, *State Net Metering Policies*, *available at* http://www.ncsl.org/research/energy/net-metering-policy-overview-and-state-legislative-updates.aspx (showing almost forty states have "net metering" programs).[5]

---

[5] Ironically, in urging that its discriminatory rate-making advances legitimate objectives, SRP relies on an Arizona Corporation Commission ("Arizona Commission") decision concerning whether full retail net metering "results in a cost shift from solar customers to non-solar customers." Pet. Br. at 8 n.2. However, since that case turned on the very kind of fact-finding SolarCity seeks to challenge in this case, SRP's reference merely highlights that its state-action defense is closely tied to the specific facts of

The Arizona legislature has further sought to insure that electricity "self-generators" – such as those consumers who install rooftop solar systems – obtain the same "just and reasonable" rates as all other utility customers. Ariz. Rev. Stat. § 40-332 (2017). This policy preference furthers the legislature's overall intent for Arizona citizens to obtain "consumer protection against overreaching by" those selling electricity and other essential services. *Arizona Corp. Comm'n v. Arizona ex rel. Grant Woods*, 171 Ariz. 286, 290 (1992).

Finally, the legislature's framework for electricity restructuring, which would allow for some level of competition in the State, also runs contrary to SRP's rates challenged here, and thus further undermines SRP's claim that its challenged discriminatory rates were state-authorized. Ariz. Rev. Stat. § 30-800 (2017), et seq.; *see also Kay Elec. Coop. v. Newkirk*, 647 F.3d 1039,

---

this case – which, once again, undermines SRP's claimed right to an interlocutory appeal of a purely legal issue.

In addition, the Arizona Commission decision that SRP cites recognized that the claimed "cost-shift issue would benefit from a detailed analyses of the costs and benefits of distributed generation systems," which can vary depending on numerous factors. *In re Arizona Public Service Commission's Application for Approval of Net Metering Cost Shift Solution*, File No. E-01345A-13-0248, Decision 74202 (Ariz. Corp. Comm'n 2013), at 28, *available at* http://images.edocket.azcc.gov/docketpdf/0000149849.pdf. Indeed, as a study by the U.S Department of Energy concluded, contrary to SRP's cost-shift premise, "[f]or the vast majority of states and utilities, the effects of distributed solar on retail electricity prices will likely remain negligible for the foreseeable future." Galen Barbose, Lawrence Berkeley Nat'l Lab., *Putting the Potential Rate Impacts of Distributed Solar into Context* at 29 (2017), *available at* https://emp.lbl.gov/sites/default/files/lbnl-1007060.pdf.

1045 (10th Cir. 2011) (Gorsuch, J.) (relying on electricity competition framework "on the books" to find "a policy preference for competition"). That framework also indicates that the legislature expects public power entities to treat "self-generators" (like those with rooftop solar) like any other "demand reduction" effort (such as those installing better insulation or other energy efficiency measures) – an approach also at odds with the discriminatory rates which SRP imposed on distributed solar customers alone. *See* Ariz. Rev. Stat. § 30-805 (2017) (discussing restrictions on recovering stranded costs after restructuring); *see also* J.A. at 46 (¶ 133) (alleging SRP discriminatory treatment between different electricity demand reduction efforts).

Moreover, as reflected in executive orders from several Arizona governors, the State has adopted policies supporting renewable energy, including distributed solar generation, as a tool to address the climate change crisis. Thus, in a 2010 executive order, Governor Janice Brewer declared that Arizona "strive[s] for pragmatic, pro-active approaches to climate change mitigation and adaptation by advancing clean and renewable energy, including solar power," as the State becomes "a leader in the field of solar and renewable energy." Ariz. Exec. Order No. 2010-006 (July 1, 2010), *available at* http://azmemory.azlibrary.gov/cdm/ref/collection/execorders/id/690. Indeed, the U.S. Department of Energy's National Renewable Energy Laboratory has found Arizona could obtain more than 30% of its electricity from rooftop solar systems alone – although to date it accounts for less than 2% of total

electricity generation for the State. *See* Peter Gagnon et al., Nat'l Renewable Energy Lab., *Rooftop Solar Photovoltaic Technical Potential in the U.S.: A Detailed Assessment*, at 26, Table 3 (2016), *available at* https://www.nrel.gov/docs/fy16osti/65298.pdf; U.S. Energy Info. Admin., Electric Power Monthly, Table 1.3.b and Table 1.17.b (November 2017), *available at* https://www.eia.gov/electricity/monthly/current_month/epm.pdf (comparing net generation year-to-date by November 2017 for small-scale photovoltaic ("PV") to utility-scale facilities for electric power).

Similarly, in a 2006 executive order, Governor Janet Napolitano – recognizing that a "scientific consensus has developed that increasing emissions of carbon dioxide [], methane and other greenhouse gases [] released to the atmosphere are affecting the Earth's climate" – committed Arizona to reducing greenhouse gas ("GHG") emissions pursuant to advice from the State's Climate Change Advisory Group. Ariz. Exec. Order No. 2006-13 (Sept. 7, 2006), *available at* http://azmemory.azlibrary.gov/cdm/ref/collection/execorders/id/507. The Advisory Group, in turn, recommended that Arizona pursue this goal by, *inter alia*, removing "barriers to renewable energy and clean distributed generation [] to enable more clean generation to enter Arizona's energy supply mix." Ariz. Climate Change Advisory Group, *Climate Change Action Plan* 12 (2006), *available at* http://azmemory.azlibrary.gov/cdm/ref/collection/statepubs/id/3104.

In sum, the authorization prong of the state-action defense requires a showing that the State has

"foreseen and implicitly endorsed the anticompetitive effects" of the challenged action "as consistent with its policy goals." *Phoebe Putney*, 568 U.S. at 229. Given the numerous Arizona policies promoting rooftop solar deployment as a vital component of the renewable energy transition, and the tension between those goals and SRP's rates allegedly designed to unlawfully stifle rooftop solar expansion in SRP's service territory, resolving the "authorization" prong of SRP's state-action defense is not nearly as straightforward as SRP suggests. Rather, as with the direct supervision requirement, it is closely tied with the merits of SolarCity's antitrust claims, and raises no "particular value of a high order" warranting interlocutory appeal. *Will*, 546 U.S. at 352.

II. THE FOUNDATIONAL PREMISES OF SRP'S ASSERTED RIGHT TO AN UNBOUNDED MONOPOLY DO NOT HOLD IN THE AGE OF DISTRIBUTED SOLAR COMPETITION

SRP asserts that the state-action defense protects "the need to ensure that government policymakers exercise their discretion efficiently and freely, *i.e.*, with the objective of *advancing the public interest* rather than of avoiding litigation." Pet. Br. at 35 (emphasis added). Similarly, APPA claims that the state-action defense "protects public power utilities' ability to meet their public goals" and thereby "allows states to *favor public objectives* over free-market competition." APPA Br. at 2, 4 (emphasis added). However, SRP and other public power companies are not advancing public

objectives or the public interest when they improperly target distributed solar generation.

Stifling solar energy competition through discriminatory rates – a widespread action perpetuated by SRP and numerous other power companies – harms the public interest by obstructing the tremendous benefits that distributed solar generation brings to both consumers and the environment. Such discriminatory behavior therefore contravenes the underlying purpose of the regulated monopoly, which was to protect consumers and the public interest. The state-action defense, and interlocutory appeal of adverse state-action defense rulings, should not be available as a legal bulwark for power companies like SRP to exercise unbounded monopoly power that works against the public interest in this anti-competitive manner.

A. The Premise That Electricity Monopolies Necessarily Serve The Public Interest Has Been Undermined By Public Policy And Technology

"Until relatively recently, most state energy markets were vertically integrated monopolies – *i.e.*, one entity . . . controlled electricity generation, transmission, and sale to retail consumers." *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016). In the electricity industry's infancy of the early 1900s, the vertically integrated regulated monopoly made sense in light of the available technology and existent business structures of the time. Originally a natural

monopoly, the electricity sector faced extreme barriers to entry, whereby construction of power plants and grid infrastructure required massive capital investments, as well as substantial economies of scale, whereby the average cost of delivered power became cheaper with new expansion in demand. Paul Garfield & Wallace Lovejoy, *Public Utility Economics* 15-19 (1964).

The foundational premise for granting vertically integrated utilities monopoly power was to ultimately serve the public interest.[6] The electricity monopoly model sought to achieve widespread access to electricity as a public good while, at the same time, subjecting utilities to electricity rate regulation in order to prevent price gouging for ultimate consumer benefit. W.M. Warwick, U.S. Department of Energy, *A Primer on Electric Utilities, Deregulation, and Restructuring of U.S. Electricity Markets* 2.0 (2002), *available*

---

[6] Regulation, as an oversight mechanism for natural monopolies, and antitrust laws, as an oversight mechanism over competitive markets, have traditionally been viewed as binary legal approaches serving the same purpose: keeping industry in check and thereby ensuring fair consumer prices and public interest protection. Thus, as Justice Breyer has written, while antitrust laws serve to police competition in traditional competitive markets, regulation serves as "an alternative to antitrust, necessary when antitrust cannot successfully maintain a workably competitive marketplace or when such a marketplace is inadequate due to some other serious defect." Stephen Breyer, *Regulation and Its Reform* 156-57 (1982). As such, in light of increasingly disaggregated electricity services and technological innovation, legal approaches must also evolve to keep pace with the industry's ongoing development between monopolistic and competitive free market structures.

at https://www.pnnl.gov/main/publications/external/technical_reports/PNNL-13906.pdf; *see also Smyth v. Ames*, 169 U.S. 466, 544-45 (1898) (public utility monopolies were "created for [] public purposes [and] perform[] a function of the state," and the government is obligated to "protect the people against unreasonable charges for services rendered by" the public utility).

However, the century-old premise that vertically integrated monopolies necessarily serve the public interest has been undermined by public policy and technology. In terms of policy, electricity regulators have actively encouraged competition in electricity generation in order to serve the public interest. For example, as the Court noted in *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760 (2016), the Federal Energy Regulatory Commission ("FERC") "often forgoes the cost-based rate-setting traditionally used to prevent monopolistic pricing [. . .] [and] instead undertakes to ensure 'just and reasonable' wholesale rates *by enhancing competition* – attempting . . . 'to break down regulatory and economic barriers that hinder a free market in wholesale electricity.'" *Id.* at 768 (emphasis added) (quoting *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527 (2008)).

Indeed, Congress passed a series of modern laws intended to promote competition in the electricity sector and unbundle the services of the traditional vertically integrated monopoly, all as a means to advance the public interest. Thus, due to "[t]echnological advances [that] made it possible to generate electricity

efficiently in different ways and in smaller plants" and through grids that were "unlike the local power networks of the past," *New York v. FERC*, 535 U.S. 1, 7 (2002), Congress passed both (i) the 1978 Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117, which directed FERC to promulgate rules requiring monopoly utilities to purchase electricity from independent power production facilities, and (ii) the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, authorizing FERC to order individual monopoly utilities to provide transmission services to unaffiliated wholesale generators. *See New York*, 535 U.S. at 9. In short, the assumption that the vertically integrated utility monopoly automatically serves the public interest has been undermined by public policy promoting competition in electricity services.

Distributed solar technology further subverts the economic and public interest assumptions justifying the traditional vertically integrated electricity monopoly. Distributed solar technology, with a relatively low barrier of entry, is de-centralized and can be owned or leased by consumers who are otherwise captive to the local utility monopoly. Ari Peskoe, *Unjust, Unreasonable, and Unduly Discriminatory: Electric Utility Rates and the Campaign Against Rooftop Solar*, 11 Tex. J. Oil Gas & Energy L. 211, 215 (2016). Distributed solar generation thus dispels the assumption that electricity service necessarily requires large economies of scale. John Farrell, Inst. for Local Self-Reliance, *Is Bigger Best in Renewable Energy?* 2-4 (2016), *available at*

https://ilsr.org/wp-content/uploads/2016/12/Is-Bigger-Best-in-Renewable-Energy-Report-Final.pdf. As such, distributed solar generation also fundamentally ruptures the business model of the vertically integrated monopoly, obviating the need for power companies like SRP to continuously construct infrastructure as their engine of profit generation. Peskoe, 11 Tex. J. Oil Gas & Energy L. at 228-32.

Taken together, these changes in public policy and technology, particularly distributed solar generation, undermine the assumption that electricity companies require deference to their monopoly power in order to serve the public interest.

B. Monopoly Power Companies Opposing Distributed Solar Generation Are Acting Against The Public Interest

1. Discriminatory rates against rooftop solar are widespread

Across the United States, both public and private electric utility companies have responded to competition from distributed solar generation with a range of discriminatory tactics, chief among them being the imposition of retail rate structures that serve to reduce solar power's cost advantage over grid-supplied energy. *See* Michael Wara, *Competition at the Grid Edge: Innovation and Antitrust Law in the Electricity Sector*, 25 N.Y.U. Envtl. L.J. 176, 189 (2017). In the last few years alone, these types of rate cases seeking to penalize rooftop solar customers have amounted to hundreds

and have occurred in the majority of U.S. states. *Id.* at 194-99; *see also* N.C. Clean Energy Tech. Ctr., *The 50 States of Solar Report: Q4 2017 and 2017 Annual Report* (2018), *available at* https://nccleantech.ncsu.edu/wp-content/uploads/Q4-17_SolarExecSummary_Final.pdf (documenting over 100 policy actions negatively targeting distributed generation customers in over 35 states in 2017 alone).[7]

Power utilities have imposed discriminatory retail rate structures on distributed solar customers in several forms. First, utilities have implemented either new or increased fixed monthly bill charges that are discriminatorily high for customers with distributed solar generation, known as a "fixed charge." For example, Santee Cooper, a state-owned public power utility

---

[7] While the following discussion details successful attempts to impose discriminatory rates, in many other instances, both public and private power companies have been rebuffed in these efforts. *Id.* This trend not only demonstrates the widespread practice by utilities of improperly targeting distributed solar competition, but also the mixed responses by regulatory boards and commissions, thus evincing an area in regulatory flux and not warranting automatic insulation from competition.

In any event, the fact that electricity utilities have had some success in convincing regulatory boards and commissions to impose rates targeting rooftop solar generation certainly does not mean those rates are just and reasonable. Rather, given the inevitable tension between distributed solar generation and the monopoly utility model, these outcomes call into question whether the Court, in an appropriate case, should reconsider the deference afforded to state authorization for the exercise of monopoly power, and instead take into account a broader consideration of the public interest that reflects the overall consumer and environmental interests at stake. *See supra* at 24-27.

in South Carolina, imposed a fixed charge of $4.40/kW as well as further stand-by charges on distributed solar customers, regardless of the amount of energy used by the customer. *See* Santee Cooper, Distributed Generation Rider DG-17 (2015), *available at* https://www.santeecooper.com/pdfs/rates/ratesadjustment/dg-17-rider.pdf; *see also*, *e.g.*, Bd. of Dir. of Sacramento Mun. Util. Dis., Resolution No. 15-07-06 (Sacramento Mun. Util. Dist. July 16, 2015) (imposing higher fixed charges and time-of-use rates on solar customers); Kan. City Power & Light, Docket No. 15-WSEE-115-RTS (Mo. Corp. Comm'n Sep. 24, 2015) (Order Approving Stipulation and Agreement) (approving a 21% increase of fixed charges on distributed energy customers); Conn. Light & Power, Docket No. 14-05-06 (Conn. Pub. Util. Regulatory Authority Dec. 17, 2014) (Order Amending Rate Schedules) (also imposing a 20% increase of fixed charges on distributed energy customers).

Second, utility companies have imposed electricity charges on solar customers that vary as a function of the consumer's peak demand for energy, known as a "demand charge." *See*, *e.g.*, NSTAR Elec. Co., D.P.U. 17-05-B (Mass. Dept. of Pub. Util. Jan. 5, 2018) (Order Establishing Eversource's Rate Structure) (approving mandatory demand charges specifically on residential distributed solar customers).

SRP's new rate structure exemplifies both of these discriminatory rate practices, as SRP imposed both a fixed distribution charge of up to $37.88 per month and increased demand charges ranging from $30 to $125

per month for all residential distributed solar customers. J.A. 33 (¶ 108). These rate changes resulted in an increase of approximately 65% in energy fees (or $600 per year) for a typical solar customer, as opposed to a 3.9% increase in energy fees for a non-solar customer. *See* J.A. 8-9 (¶ 5); *see also, e.g.*, Wis. Electric Power Co., Docket No. 5-UR-107 (Wis. Public Service Comm'n Dec. 23, 2014) (Final Decision) (approving application to impose high demand charges, fixed charges, and time-of-use rates on distributed solar customers).

2. Discriminatory rates against rooftop solar harm consumers and the environment

Wide-scale discriminatory rates targeting solar power deployment undermine the very public objectives that power utility monopolies were created to serve because they harm both consumers and the environment.

First, rates that stifle the deployment of rooftop solar harm consumers by diminishing the economic and social value they receive through generating their own power. Due to technological advances, the cost of residential solar has dropped precipitously and is cost-comparable, if not lower, than the average price of power purchased from the utility grid. *See, e.g.*, Gideon Weissman & Brett Fanshaw, *Shining Rewards: The Value of Rooftop Solar Power for Consumers and Society* (2016), *available at* https://environmentamerica.org/sites/environment/files/reports/AME%20ShiningRewards%20Rpt%20Oct16%201.1.pdf; Mark Muro & Devashree

Saha, *Rooftop Solar: Net Metering is a Net Benefit*, Brookings Institution (May 23, 2016), *available at* https://www.brookings.edu/research/rooftop-solar-net-metering-is-a-net-benefit/. Further, distributed solar generation can serve to democratize power ownership by increasing local control over power decisions, returning economic benefits directly to the served community and promoting a more equitable distribution of economic and social benefits across racial and economic lines. *See generally* Local Clean Energy All. & Center for Social Inclusion, *Democratizing Our Energy Future* (2015), *available at* http://www.localcleanenergy.org/files/Climate%20Justice%20Energy%20Platform.pdf.

Second, discriminatory rates inhibiting distributed solar generation stave off the public health benefits associated with phasing out fossil fuel combustion from power plants. Nearly 40% of Americans are exposed to toxic air pollution from fossil fuel power plants that often reaches dangerous levels, resulting in the increased incidence of asthma and chronic bronchitis and leading to hundreds of thousands of premature deaths per year. *See* Am. Lung Ass'n, *State of the Air* 9 (2017), *available at* http://www.lung.org/assets/documents/healthy-air/state-of-the-air/state-of-the-air-2017.pdf. Critically, these public health impacts are disproportionately borne by communities of color and low-income, who more often live in closer proximity to fossil fuel power plants. *Id.* at 41; *see also* National Ass'n for the Advancement of Colored People & Clean Air Task Force, *Fumes Across the Fence-Line: The Health Impacts of Air Pollution from Oil and Gas Facilities*

(2017), *available at* http://www.naacp.org/wp-content/uploads/2017/11/Fumes-Across-the-Fence-Line_NAACP_CATF.pdf. Accordingly, obstructing distributed solar generation directly exacerbates the country's systemic public health disparities by perpetuating reliance on fossil fuel power.

Finally, these discriminatory rates hinder the country's urgently needed transition to clean energy in order to combat climate change. More than 60% of America's electricity still derives from fossil fuels. U.S. Energy Info. Admin., *Electricity Explained* (May 10, 2017), *available at* https://www.eia.gov/energyexplained/index.cfm?page=electricity_in_the_united_states. As a result, the electricity sector is the single largest source of GHG emissions in the country, accounting for nearly one-third of total U.S. GHG emissions in 2015. U.S. Envtl. Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2015* ES-24 (2017), *available at* https://www.epa.gov/sites/production/files/2017-02/documents/2017_executive_summary.pdf.

Accordingly, discriminatory ratemaking against the deployment of distributed solar energy, like that implemented by SRP, undermines the inherent public interest in "aggressive and sustained greenhouse gas emission reductions" in order to avoid some of the worst impacts of climate change. Jerry Melillo et al., U.S. Global Change Research Program, *Climate Change Impacts in the United States: The Third National Climate Assessment* 13 (2014), *available at* http://s3.amazonaws.com/nca2014/low/NCA3_Climate_Change_Impacts_in_the_United%20States_LowRes.

pdf?download=1 ("2014 Climate Assessment"). Indeed, the public harms caused by climate change are immense: the increased extinction of species and ocean acidification; the rapid loss of Arctic sea ice and the collapse of Antarctic ice shelves; declining global food and water security; and the heightened frequency of heat waves and other extreme weather events, including contribution to the three unprecedented hurricanes that ravaged the Gulf Coast, Florida, and Puerto Rico in 2017. *See generally* 2014 Climate Assessment; *see also* Michael Mann et al., *What We Know About the Climate Change-Hurricane Connection*, Scientific American (Sept. 8, 2017), *available at* https://blogs.scientificamerican.com/observations/what-we-know-about-the-climate-change-hurricane-connection/.

For all these reasons, it could not be clearer that by obstructing the realization of these consumer and environmental benefits, utility rates which improperly discourage the transition to renewable energy sources like rooftop solar are contrary to the public interest.

C. Allowing Public Power Companies To Obtain Interlocutory Appeal Of State-Action Immunity Rulings Will Only Encourage More Discriminatory Rates Contrary To The Public Interest

The central premise of SRP's asserted right to interlocutory appeal is that it is necessary to allow public power entities to focus their attention on "advancing the public interest" without potential exposure to

antitrust liability. Pet. Br. at 35. However, because SRP and other utilities' decisions targeting distributed solar generation are arguably contrary to the public interest, SRP raises no "particular value of a high order" warranting immediate appeal under the collateral-order doctrine. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 605 (2009).

Instead, allowing interlocutory appeal in these circumstances will serve to further encourage power companies to unfairly obstruct distributed solar development in a manner contrary to antitrust laws, with the expectation that they can avoid liability by invoking the state-action defense and, at minimum, significantly delay antitrust litigation by immediately appealing adverse rulings. By requiring SRP to defend its rates – including its purported entitlement to the state-action defense – like any other litigant, the Court will level the playing field in an area where it has become increasingly apparent that competition, rather than the perpetuation of insulated monopoly power, will best serve the public interest.

Such a result would also be consistent with this Court's precedents recognizing that power companies are not immune from competition and antitrust laws. In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), the Court decisively held that the Federal Power Act does not "immunize" power companies from "antitrust regulation." *Id.* at 374-75 (permitting the federal government to seek antitrust remedies against a power utility which, among other things, refused to sell power to municipalities and transfer competitors'

power over its lines). As the Court has explained, a power company's "franchise to exist as a corporation and to function as a public utility . . . creates no right to be free of competition." *Tenn. Electric Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 139 (1939) (overruled in part on other grounds); *see also Alabama Power Co. v. Ickes*, 302 U.S. 464, 480 (1938) (holding that power utilities do not "possess" any inherent legal "right to be immune from lawful . . . competition"). These findings are grounded in the recognition that "[t]he public interest is far broader than the economic interest of a particular power supplier." *Otter Tail Power Co.*, 410 U.S. at 380 n.10. Accordingly, *Amici* urge the Court to recognize that, at least with respect to monopoly practices serving to obstruct distributed solar generation, the state-action defense and interlocutory appeal of adverse immunity rulings should be disfavored.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

HOWARD M. CRYSTAL
Counsel of Record
ANCHUN JEAN SU
CENTER FOR BIOLOGICAL DIVERSITY
1411 K Street, N.W., Suite 1300
Washington, DC 20005
(202) 849-8397
hcrystal@biologicaldiversity.org

Counsel for Amici Curiae

February 2018

No. 17-368

IN THE

Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Petitioner,

v.

TESLA ENERGY OPERATIONS, INC., F/K/A SOLARCITY CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FEDERAL COURTS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

SARAH E. HARRINGTON
Goldstein & Russell, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814

STEPHEN I. VLADECK
Counsel of Record
727 East Dean Keeton St.
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu

Counsel for Amici Curiae

February 20, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 6

I. SUBSTANTIVE DEFENSES TO LIABILITY ARE NOT PROPERLY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE 6

II. THE STATE-ACTION DOCTRINE IS A SUBSTANTIVE DEFENSE TO FEDERAL ANTITRUST LIABILITY 14

CONCLUSION 22

APPENDIX A-1

TABLE OF AUTHORITIES

CASES

Abney v. *United States*,
431 U.S. 651 (1977) 11

Al Shimari v. *CACI Int'l, Inc.*,
679 F.3d 205 (4th Cir. 2012) (en banc) 11

Alden v. *Maine*,
527 U.S. 706 (1999) 17

Ashcroft v. *Iqbal*,
556 U.S. 662 (2009) 13

Burlington N. & Santa Fe Ry. Co. v. *Vaughn*,
509 F.3d 1085 (9th Cir. 2007) 13

Cal. Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*,
445 U.S. 97 (1980) 19, 20

Cohen v. *Beneficial Indus. Loan Corp.*,
337 U.S. 541 (1949) 2, 3, 7, 9, 10, 20

Courtright v. *City of Battle Creek*,
839 F.3d 513 (6th Cir. 2016) 5, 18

Digital Equipment Corp. v. *Desktop Direct, Inc.*,
511 U.S. 863 (1994) 2, 4, 7, 9, 11, 12, 20

Firestone Tire & Rubber Co. v. *Risjord*,
449 U.S. 368 (1981) 7

FTC v. *Phoebe Putney Health Sys., Inc.*,
568 U.S. 216 (2013) 4, 15, 19

FTC v. *Ticor Title Ins. Co.*,
504 U.S. 621 (1992) 15, 19

Gelboim v. *Bank of Am. Corp.*,
135 S. Ct. 897 (2015) 3, 10

Henry v. *Lake Charles Am. Press LLC*,
566 F.3d 164 (5th Cir. 2009) 10

Jinks v. *Richland County*,
538 U.S. 456 (2003) 17

Kerr v. *U.S. Dist. Ct. for the N. Dist. of Cal.*,
426 U.S. 394 (1976) 6

Kilburn v. *Socialist People's Libyan Arab Jamahiriya*,
376 F.3d 1123 (D.C. Cir. 2004) 13

Lake Country Estates, Inc. v. *Tahoe Regional Planning Agency*,
440 U.S. 391 (1979) 17

Lauro Lines s.r.l. v. *Chasser*,
490 U.S. 495 (1989) 9

Microsoft Corp. v. *Baker*,
137 S. Ct. 1702 (2017) 8

Midland Asphalt Corp. v. *United States*,
489 U.S. 794 (1989) 3, 12

Mitchell v. *Forsyth*,
472 U.S. 511 (1985) 7, 12, 13

Mohawk Indus. v. *Carpenter*,
558 U.S. 100 (2009) 3, 8, 10, 11

N. Ins. Co. of N.Y. v. *Chatham County*,
547 U.S. 189 (2006) 17

N.C. State Bd. of Dental Examiners v. *FTC*,
135 S. Ct. 1101 (2015) 3, 5, 10, 15, 18, 19, 20

Nixon v. *Fitzgerald*,
457 U.S. 731 (1982) 13

Osborn v. *Haley*,
549 U.S. 225 (2007) 13, 14

Owen v. *City of Independence*,
445 U.S. 622 (1980) 18

P.R. Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*,
506 U.S. 139 (1993) 13, 17

Parker v. *Brown*,
317 U.S. 341 (1943) ..... *passim*

Patrick v. *Burget*,
486 U.S. 94 (1988) 20

Richardson-Merrell, Inc. v. *Koller*,
472 U.S. 424 (1985) 7

S.C. State Bd. of Dentistry v. *FTC*,
455 F.3d 436 (4th Cir. 2006) 5, 18

Seaman v. *Duke Univ.*,
No. 15-462, 2016 WL 1043473
(M.D.N.C. Feb. 12, 2016) 11

SolarCity Corp. v. *Salt River Project Agric. Improvement & Power Dist.*,
859 F.3d 720 (9th Cir. 2017) 1, 2, 14

Swint v. *Chambers County Comm'n*,
514 U.S. 35 (1995) 8

United States v. *Rostenkowski*,
59 F.3d 1291 (D.C. Cir. 1995) 13

Van Cauwenberghe v. *Biard*,
486 U.S. 517 (1988) 11, 12, 20

Will v. *Hallock*,
546 U.S. 345 (2006) 2, 8, 10

Will v. *United States*,
389 U.S. 90 (1967) 6

FEDERAL STATUTES AND RULES

28 U.S.C.
§ 1291 ..... 2, 6, 7, 8, 11, 12, 20
§ 1292(b) 3, 10
§ 1292(e) 8
§ 1651 ..... 3, 10
§ 2072(c) 8

Local Government Antitrust Act of
1984,
Pub. L. No. 98-544, 98 Stat. 2750 16

Sherman Act, 15 U.S.C. §§ 1 *et seq.* 4, 5, 15, 16, 19

Fed. R. Civ. P. 23(f) 9

INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are law professors who teach and write in the field of federal courts, with particular attention to the allocation of federal jurisdiction as between the district courts and courts of appeals. *Amici* take no position on the merits of Respondent's claims against Petitioner. Instead, *amici* come together in this case out of a shared belief that the decision below correctly declined to extend the collateral order doctrine to encompass a district court's rejection of a state-action defense under federal antitrust law. *See SolarCity Corp.* v. *Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720 (9th Cir. 2017).

More to the point, and contrary to the arguments of the Petitioner and its *amici*, *amici* Federal Courts Scholars are of the view that the collateral order doctrine can—and does—meaningfully distinguish between immunities from suit and substantive defenses to liability. Although a district court's rejection of claims in the former category often will be appropriately subject to immediate appeal under the collateral order doctrine, its denial of the latter class of claims never should be.

SUMMARY OF ARGUMENT

For seven decades, this Court has recognized a "small class [of trial-court rulings] which finally determine claims of right separable from, and

---

1. The Petitioner has lodged a blanket consent to the filing of *amicus* briefs, and Respondent has consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Such immediately appealable "collateral orders" must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will* v. *Hallock*, 546 U.S. 345, 349 (2006) (alterations in original; internal quotation marks omitted).

In this case, the putatively "collateral" order at issue is the district court's denial of Petitioner's motion to dismiss Respondent's antitrust suit based upon the "state-action" doctrine recognized by this Court in *Parker* v. *Brown*, 317 U.S. 341 (1943). The Ninth Circuit held that *Parker* claims are not immediately appealable collateral orders. *SolarCity*, 859 F.3d at 725–27. A proper understanding of the collateral order doctrine itself—and of *Parker* and its progeny—compels the conclusion that the Court of Appeals was correct, and that its decision dismissing Petitioner's appeal should be affirmed.

I. The collateral order doctrine is "best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quoting *Cohen*, 337 U.S. at 546). To ensure that the doctrine does not undermine that rule, this Court "ha[s] not mentioned applying the collateral order doctrine recently without emphasizing its modest scope." *Will*, 546 U.S. at 350. "And we have meant what we have

said; although the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership." *Id.* This skepticism toward judge-made expansions of the doctrine has understandably grown since Congress expressed its preference for rulemaking, rather than judicial rulings, as the appropriate mechanism to identify new species of interlocutory appellate jurisdiction. *See Mohawk Indus.* v. *Carpenter*, 558 U.S. 100, 113 (2009).

As such, the district court's ruling must satisfy an existing strand of the collateral order doctrine. And although *Cohen* identified three factors, the core of the inquiry is whether the denial of Petitioner's claim is effectively unreviewable on appeal after an adverse final judgment. If a trial-court order *is* effectively reviewable after final judgment, there is no categorical imperative justifying abnormal resort to interlocutory appellate intervention. And any case-specific imperative can be addressed through the case-specific alternatives of certification under 28 U.S.C. § 1292(b), *see, e.g.*, *Gelboim* v. *Bank of Am. Corp.*, 135 S. Ct. 897, 906 (2015), or, in extraordinary instances, writs of mandamus under 28 U.S.C. § 1651. *See Mohawk*, 558 U.S. at 110–11.

For those reasons, a defendant's assertion of an "immunity" will never satisfy the collateral order doctrine if the immunity is, in fact, better understood as a defense to all (or certain kinds of) liability, rather than a right to be free from the cost of the underlying litigation *itself—i.e.*, a right not to be tried. Of course, "[o]ne must be careful . . . not to play word games with the concept of a 'right not to be tried.'" *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 801 (1989). Otherwise, at a sufficiently high level of

abstraction, "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a right not to stand trial." *Digital Equipment*, 511 U.S. at 873. That said, it is possible to identify such rights not to stand trial, at least in this context, with more clarity and precision than Petitioner suggests: At a minimum, an appellant invoking the collateral order doctrine to vindicate a claimed right not to be tried should have the burden of identifying the constitutional provision, statute, or common-law rule that specifically confers upon them an immunity from being brought into court at all.

II. The Petitioner here cannot satisfy that burden. *Parker*'s state-action rule derives from the absence of any affirmative indication that Congress in the Sherman Act "intended to restrict the sovereign capacity of the States to regulate their economies." *FTC* v. *Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 224 (2013). However *Parker* is characterized, its core is a judicial construction of the substantive scope of the Sherman Act, to wit, of the limits on the *liability* it imposes. *See* 317 U.S. at 352 ("The state . . . , as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.").

Because the Sherman Act, as construed by this Court, does not create a right not to be tried, the Petitioner and its *amici* instead rely upon interests that are adequately protected by other immunity doctrines, especially sovereign and official immunity. Of course, there is no reason why those immunities would be unavailable if Petitioner were actually entitled to them—or why a wrongful denial of such immunities would not be immediately appealable. Instead, "the only time that a party must rely on

Parker to justify immediate appeal is when . . . it *cannot* assert a sovereign or qualified immunity defense." *S.C. State Bd. of Dentistry* v. *FTC*, 455 F.3d 436, 447 (4th Cir. 2006) (emphasis added). In such cases, this Court has already determined that the interests upon which the Petitioner and its *amici* rely are insufficient to justify immunity from suit. It follows *a fortiori* that the interests in such cases also do not justify an immediate, interlocutory appeal. *See, e.g.*, *Courtright* v. *City of Battle Creek*, 839 F.3d 513 (6th Cir. 2016).

The inappropriateness of extending the collateral order doctrine to encompass a district court's rejection of a *Parker* claim is reinforced by the "flexible and context-dependent" analysis courts must undertake in determining whether a "nonsovereign entity—public or private—controlled by active market participants" is exempted from the Sherman Act, *i.e.*, whether they were actively supervised by the state. *N.C. State Bd. of Dental Examiners* v. *FTC*, 135 S. Ct. 1101, 1113, 1116 (2015). Such an inquiry typically will depend not only upon the details of specific legal arrangements under state law, but also upon case-specific determinations concerning the extent of a state's *actual* involvement in overseeing the entity at issue. *See, e.g.*, *id.* at 1118 (Alito, J., dissenting) ("Determining whether a state agency is structured in a way that militates against regulatory capture is no easy task . . . .").

Because this Court is properly loath to expand the collateral order doctrine through common law, these defects are fatal to Petitioner's argument here—and should therefore compel the conclusion that the Court of Appeals correctly dismissed Petitioner's interlocutory appeal.

ARGUMENT

I. SUBSTANTIVE DEFENSES TO LIABILITY ARE NOT PROPERLY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE

A. This Collateral Order Doctrine is a Narrow—and Carefully Circumscribed—Exception to the Final Judgment Rule

The final judgment rule codified at 28 U.S.C. § 1291 has historically served as a powerful bulwark against piecemeal litigation and unnecessary pressure on appellate dockets. *See, e.g.*, *Kerr* v. *U.S. Dist. Ct. for the N. Dist. of Cal.*, 426 U.S. 394, 403 (1976) ("[P]articularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation."). To that end, "[i]t has been Congress' determination since the Judiciary Act of 1789 that as a general rule 'appellate review should be postponed . . . until after final judgment has been rendered by the trial court.'" *Id.* (quoting *Will* v. *United States*, 389 U.S. 90, 96 (1967)).

More than just a tool for increasing the efficiency of litigation, the final judgment rule serves as an important statutory barrier to what otherwise might be a deluge of interlocutory appeals—appeals that would unduly burden the courts of appeals, undermine the case-management authority of the district courts, and inevitably tilt civil litigation toward the party with greater financial resources. As Justice Marshall explained, the final judgment rule

> emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that

> occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "[avoiding] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." The rule also serves the important purpose of promoting efficient judicial administration.

Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368, 374 (1981) (alteration in original; citations omitted); *see also Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 430 (1985) ("In § 1291 Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by 'piecemeal appellate review of trial court decisions which do not terminate the litigation.'" (citation omitted)).

The collateral order doctrine is "best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Digital Equipment*, 511 U.S. at 867 (quoting *Cohen*, 337 U.S. at 546). To ensure that the doctrine does not undermine the purpose and effect of the final judgment rule, this Court "ha[s] not mentioned applying the collateral order doctrine recently without emphasizing its modest scope." *Will*,

546 U.S. at 350; *see also Digital Equipment*, 511 U.S. at 868 ("[T]he 'narrow' exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." (citation omitted)). "And we have meant what we have said; although the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership." *Will*, 546 U.S. at 350.

As this Court recognized in *Mohawk*, judicial skepticism of arguments for expanding the collateral order doctrine is further justified by multiple acts of Congress "designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable." 558 U.S. at 113 (quoting *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 48 (1995)); *see also* 28 U.S.C. § 1292(e) ("The Supreme Court may prescribe rules . . . to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for . . . ."); *id.* § 2072(c) ("Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.").

Thus, "Congress, which holds the constitutional reins in this area, has determined that such value judgments are better left to the collective experience of bench and bar and the opportunity for full airing that rulemaking provides." *Mohawk*, 558 U.S. at 118–19 (Thomas, J., concurring in part and concurring in the judgment). And as this Court observed just last year in *Microsoft Corp.* v. *Baker*, 137 S. Ct. 1702 (2017), resort to the rulemaking process for new expansions of interlocutory appellate jurisdiction

helped to result in the "careful calibration" of Fed. R. Civ. P. 23(f). *Id.* at 1709 & n.4.

B. A Collateral Order Must Be Effectively Unreviewable After a Final Judgment and of Sufficient Importance to Justify Interlocutory Appellate Intervention

For the rare category of orders properly deemed "collateral," and thus immediately appealable, the heart of the matter is a judgment about whether the court *ought* to permit an appeal before the case has come to its ultimate conclusion in the district court—whether the benefits of an immediate appeal outweigh its substantial costs in terms of both litigation and judicial resources. To that end, as Respondent correctly argues, collateral orders must be *both* effectively unreviewable after final judgment *and* of sufficient importance to justify interlocutory appellate intervention. *See, e.g., Digital Equipment*, 511 U.S. at 878–79 ("[T]he third *Cohen* question, whether a right is 'adequately vindicable' or 'effectively reviewable,' simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement."); *see also Lauro Lines s.r.l.* v. *Chasser*, 490 U.S. 495, 502 (1989) (Scalia, J., concurring) ("The importance of the right asserted has always been a significant part of our collateral order doctrine.").

As Justice Souter wrote for this Court in *Will*,

> In each case [in which the collateral order doctrine has been upheld], some particular value of a high order was marshaled in support of the interest in avoiding trial: honoring the separation of powers, preserving the efficiency of

> government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual. That is, it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is "effectively" unreviewable if review is to be left until later.

546 U.S. at 352–53.

Although a properly appealable collateral order must of course satisfy all three of *Cohen*'s requirements, its hallmark is thus the district court's refusal to vindicate a sufficiently important interest the abridgement of which is "effectively unreviewable" if appellate review is deferred until after a final judgment. *See Henry* v. *Lake Charles Am. Press LLC*, 566 F.3d 164, 177 (5th Cir. 2009) (describing unreviewability as "the fundamental characteristic of the collateral order doctrine" (citation omitted)).

If a trial-court order *is* effectively reviewable after final judgment, there is no categorical imperative justifying abnormal resort to interlocutory appellate intervention. And any case-specific imperative can be addressed through the case-specific alternatives of certification under 28 U.S.C. § 1292(b), *see, e.g.*, *Gelboim*, 135 S. Ct. at 906, or, in extraordinary instances, writs of mandamus under 28 U.S.C. § 1651. *See Mohawk*, 558 U.S. at 110–11.[2] Thus, "[a]s long as

---

2. Although Petitioner unsuccessfully sought certification of the district court's ruling under § 1292(b), Pet. Br. 10, it did not seek a writ of mandamus from the Ninth Circuit to review the

the class of claims, taken as a whole, can be adequately vindicated by other means, the chance that the litigation at hand might be speeded, or a particular injustic[e] averted, does not provide a basis for jurisdiction under § 1291." *Id.* at 107 (quoting *Digital Equipment*, 511 U.S. at 868) (second alteration in original; internal quotation marks omitted).

C. Rejections of Defenses to Liability Should Therefore Never Qualify as Immediately Appealable Collateral Orders

In cases such as these, in which the appellant claims that the relevant district court decision is an immediately appealable collateral order because it rejected an immunity claim, the "critical question . . . is whether the essence of the claimed right is a right not to stand trial"—that is, whether it constitutes a true immunity from *suit*, and not an exemption from all (or particular forms of) liability. *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 524 (1988) (internal quotation marks omitted); *see also Al Shimari* v. *CACI Int'l, Inc.*, 679 F.3d 205, 214 (4th Cir. 2012) (en banc). Absent immediate appellate review of a trial court's denial of a defendant's litigation immunity, the right not to stand trial "would be irretrievably lost." *Van Cauwenberghe*, 486 U.S. at 524 (internal quotation marks omitted); *see also Abney* v. *United States*, 431 U.S. 651, 662 (1977) ("[E]ven if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that

---

district court's rejection of its *Parker* claim. *See Mohawk*, 558 U.S. at 111 n.3; *see also Seaman* v. *Duke Univ.*, No. 15-462, 2016 WL 1043473 (M.D.N.C. Feb. 12, 2016) (certifying under § 1292(b) whether the defendant was covered by the *Parker* doctrine).

the Double Jeopardy Clause was designed to prohibit.").

By contrast, if the right at issue is one "not to be subject to a binding judgment of the court"—that is, a defense to liability—then the right can be vindicated just as readily on appeal from the final judgment, and a wrongful denial of that right is not, of itself, a collateral order. *Van Cauwenberghe*, 486 U.S. at 527; *see also Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). It's not that erroneous district court decisions in such cases are harmless or costless. But the harms and costs resulting from such rulings are outweighed by the harms and costs of allowing such immediate, interlocutory appeals.

In assessing whether the interest that the defendant seeks to vindicate is properly understood as a true litigation immunity and not as a defense to liability, "§ 1291 requires [the court] of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Digital Equipment*, 511 U.S. at 873. As this Court has repeatedly cautioned, "[o]ne must be careful . . . not to play word games with the concept of a 'right not to be tried.'" *Midland Asphalt*, 489 U.S. at 801. Otherwise, at a sufficiently high level of abstraction, "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a right not to stand trial." *Digital Equipment*, 511 U.S. at 873.

That said, it is possible to identify such rights not to stand trial, at least in this context, with more clarity and precision than Petitioner suggests: At a minimum, an appellant invoking the collateral order doctrine to vindicate a claimed right not to be tried should have the burden of identifying a constitutional

provision, a statute, or a common-law rule that specifically confers upon them an immunity from being brought into court in the first place. *See, e.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672 (2009) (explaining that district court decisions rejecting a qualified immunity defense are immediately appealable because "qualified immunity . . . is both a defense to liability and a limited 'entitlement not to stand trial or face the other burdens of litigation'" (citation omitted)).

To that end, this Court and the courts of appeals have construed the collateral order doctrine to allow immediate, interlocutory appeals from district court decisions denying claims of Eleventh Amendment immunity, *P.R. Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); tribal sovereign immunity, *Burlington N. & Santa Fe Ry. Co.* v. *Vaughn*, 509 F.3d 1085 (9th Cir. 2007); qualified immunity, *Mitchell*, 472 U.S. 511; absolute immunity, *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); immunity under the Westfall Act, *Osborn* v. *Haley*, 549 U.S. 225 (2007); immunity under the Speech or Debate Clause, *United States* v. *Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995); and foreign sovereign immunity, *Kilburn* v. *Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123 (D.C. Cir. 2004). In all of those contexts, the appellants could—and did—point to affirmative sources of a substantive right not to be tried, whether grounded in the Constitution, a federal statute, or common law.

For example, in the most recent decision in which this Court expanded the class of immediately appealable collateral orders, it was because the underlying statute—the Westfall Act—was "designed to immunize covered federal employees not simply

from liability, but from suit." *Osborn*, 549 U.S. at 238. Unless a defendant can identify a similarly affirmative source of an immunity "not simply from liability, but from suit," it is impossible to see how such a substantive defense would be effectively unreviewable on post-judgment appeal, regardless of how "important" the underlying substantive federal right at issue might be.

II. THE STATE-ACTION DOCTRINE IS A SUBSTANTIVE DEFENSE TO FEDERAL ANTITRUST LIABILITY

In its decision below, the Ninth Circuit concluded that the exception to federal antitrust claims for "state action" first recognized by this Court in *Parker* is properly characterized as a defense to liability rather than an immunity from suit—and that a district court's rejection of a *Parker* defense is therefore not an immediately appealable collateral order. *SolarCity*, 859 F.3d at 725–27.

Petitioner and its *amici* urge reversal principally on the ground that the Court of Appeals' analysis failed to recognize that, like sovereign and official immunity, the *Parker* doctrine "protects states and their citizens against unwarranted disruption of governmental functions, ensuring that public servants exercise their policymaking discretion without fear of being subjected to protracted litigation." Pet. Br. 4.

In light of the analysis above, *amici* Federal Courts Scholars are of the view that the Court of Appeals was correct, and that denials of *Parker* claims, by themselves, should never qualify as immediately appealable collateral orders. Instead, the interests protected by sovereign and official immunity doctrines

can and should be vindicated, where necessary and appropriate, by invocations of *those* grounds for an immediate, interlocutory appeal.

A. The Sherman Act Does Not Create, and *Parker* Did Not Recognize, a Freestanding Immunity From Suit

As this Court has repeatedly made clear, *Parker*'s state-action rule derives from the absence of any affirmative indication that Congress in the Sherman Act "intended to restrict the sovereign capacity of the States to regulate their economies." *Phoebe Putney*, 568 U.S. at 224; *see also N.C. State Bd. of Dental Examiners* v. *FTC*, 135 S. Ct. at 1109 ("If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, . . . federal antitrust law would impose an impermissible burden on the States' power to regulate."); *Parker*, 317 U.S. at 351 ("The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.").

In other words, whether characterized in judicial opinions as an "immunity," a "defense," or otherwise, the heart of the *Parker* doctrine is a judicial construction of the substantive scope of the Sherman Act, to wit, of the limits on the *liability* it imposes. *See Parker*, 317 U.S. at 352 ("The state . . . , as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit."); *see also FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992) (describing *Parker* as "the doctrine that federal antitrust laws are subject to supersession by state regulatory programs"). There is no suggestion in the Sherman Act itself, let alone in *Parker* or any of this

Court's subsequent decisions applying it, that Congress intended to create an immunity from suit—as opposed to a substantive exemption from liability—for defendants thereby exempted from the Sherman Act's scope.

B. Other Immunities Protect the Two Interests on Which Petitioner Relies

Tellingly, neither the Petitioner nor its *amici* offer any evidence to the contrary, or identify any language in the Sherman Act or subsequent judicial constructions thereof suggesting that the Act confers a freestanding immunity from suit.[3] Instead, their arguments rise and fall on the analogy between *Parker* claims and immunities more specifically designed to protect the unique interests of the sovereign and its officials. *See, e.g.*, Pet. Br. 13–14 ("These interests are irreversibly compromised by requiring the defendant to litigate to final judgment before having the opportunity to appeal an erroneous denial of immunity."). The central problem with this argument is that it simultaneously overstates the scope of these interests and undervalues the ability of defendants to otherwise vindicate them in cases in which they are properly implicated.

---

3. This conclusion is only bolstered by the Local Government Antitrust Act of 1984, which confers immunity from *damages*, but not from *litigation*, on local governments (or officials or employees thereof acting in an official capacity) for claims arising under sections 4, 4A, and 4C of the Clayton Act. *See* Local Government Antitrust Act of 1984, Pub. L. No. 98-544, §§ 2–3, 98 Stat. 2750, 2750–51 (codified at 15 U.S.C. §§ 35–36). Indeed, the district court in this case granted Petitioner's motion to dismiss Respondent's antitrust damages claims. *See* Pet. App. 64a–65a, 68a–69a.

Taking sovereign immunity first, even as this Court has recognized a broad scope to state sovereign immunity, *see, e.g.*, *Alden* v. *Maine*, 527 U.S. 706 (1999), it has emphasized the limits of such immunity—including that it extends only to "States and arms of the State." *N. Ins. Co. of N.Y.* v. *Chatham County*, 547 U.S. 189, 193 (2006); *see also Jinks* v. *Richland County*, 538 U.S. 456, 466 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit."). This is true even when, as here, the defendant might be said to exercise a "slice of state power." *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979) (citation and internal quotation marks omitted).

Thus, in *Chatham County*, this Court expressly rejected the argument that a public entity that did not qualify as an "arm of the state" for Eleventh Amendment purposes could nevertheless invoke a species of "residual" Eleventh Amendment immunity. 547 U.S. at 194 & n.2. Instead, in cases such as *Chatham County*, the defendant has no sufficiently compelling sovereign interest to justify either the protections of the Eleventh Amendment or the concomitant protection of the collateral order doctrine. And, of course, where a sovereign immunity defense *is* properly available, nothing precludes a sovereign defendant from invoking *it*, along with *Parker*, and appealing a denial of the former as a collateral order under *Puerto Rico Aqueduct & Sewer Authority*.

The same holds for official immunity. If a suit seeks damages against a government officer in his or her personal capacity, ordinary official immunity doctrines are available. But where those doctrines are not available (as, for example, in suits against

municipalities), this Court has determined that suits against such defendants "threaten neither officers' initiative or states' dignity." *S.C. State Bd. of Dentistry*, 455 F.3d at 446; *see Owen* v. *City of Independence*, 445 U.S. 622, 638 (1980) (holding that municipalities enjoy no official or sovereign immunity from damages suits).

As the Fourth Circuit has helpfully summarized this analysis, "the only time that a party must rely on *Parker* to justify immediate appeal is when . . . it *cannot* assert a sovereign or qualified immunity defense." *S.C. State Bd. of Dentistry*, 455 F.3d at 447 (emphasis added). In such cases, this Court has already determined that the interests upon which the Petitioner and its *amici* rely are insufficient to justify immunity from suit. It follows *a fortiori* that the interests in such cases also do not justify an immediate, interlocutory appeal. *See, e.g., Courtright*, 839 F.3d at 523.

C. The Structure of a State-Action Defense is Especially Ill-Suited for the Collateral Order Doctrine

As the above discussion makes clear, the fact that the defense recognized in *Parker* is not a categorical immunity from litigation should, of itself, dispose of this case, because it follows that a district court's rejection of a *Parker* claim at the motion-to-dismiss stage will not be "effectively unreviewable" after final judgment; defendants can avail themselves of the defense (and thereby avoid liability) on post-judgment appeal even if it was incorrectly rejected by the district court. But the specific nature of the state-action defense in cases, like this one, brought against a "nonsovereign entity . . . controlled by active market

participants," *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1113, only reinforces that conclusion.

In deciding whether such defendants, public or private, count as state actors for purposes of the Sherman Act, this Court "employ[s] a two-part test, requiring first that 'the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy . . . be actively supervised by the State.'" *Phoebe Putney*, 568 U.S. at 225 (quoting *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)); *see also Ticor Title*, 504 U.S. at 633 ("Actual state involvement, not deference to private pricefixing arrangements under the general auspices of state law, is the precondition for immunity from federal law."). As Justice Kennedy put it three years ago, "Immunity for state agencies . . . requires more than a mere facade of state involvement, for it is necessary in light of *Parker*'s rationale to ensure [that] the States accept political accountability for anticompetitive conduct they permit and control." *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1111.

As such, for nonsovereign defendants like the Petitioner here, a trial court's application of the two *Midcal* prongs typically will require detailed, case-specific analysis of the nature of the particular state action at issue, along with analysis of the relationship between the nonsovereign defendant and the putative state regulators. This is especially true with respect to *Midcal*'s second prong:

> The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private

> parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Patrick v. *Burget*, 486 U.S. 94, 101 (1988). As a result, "the inquiry regarding active supervision is flexible and context-dependent." *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1116.

Because the active-supervision inquiry is "flexible and context-dependent," it typically will depend not only upon the details of a specific legal arrangement under state law, but also upon case-specific determinations with respect to a state's theoretical *and* actual involvement in supervising the quasi-private regulatory entity. *See, e.g.*, *id.* at 1118 (Alito, J., dissenting) ("Determining whether a state agency is structured in a way that militates against regulatory capture is no easy task . . . .").

Thus, although *amici* Federal Courts Scholars are of the view that *Parker* claims never will satisfy this Court's stringent criteria for immediately appealable collateral orders, that conclusion is all the more inescapable in cases, like this one, in which *Parker*'s applicability turns on the "flexible and context-dependent" analysis of "active supervision" under *Midcal*. Such cases are hardly an appropriate candidate for the "blunt, categorical instrument of [a] § 1291 collateral order appeal." *Digital Equipment*, 511 U.S. at 883.

* * *

The Respondent has argued that the Petitioner cannot satisfy any of the three *Cohen* factors. *Amici* take no position on the first two factors because we believe that this case can—and should—be resolved solely on Petitioner's inability to satisfy the third, *i.e.*, whether the district court's denial of Petitioner's *Parker* defense is "effectively unreviewable" on appeal from an adverse final judgment. Because *Parker* recognizes a substantive exemption from antitrust liability, and not an immunity from litigation, an erroneous application of that doctrine—whatever its importance—generally will be effectively reviewable on post-judgment appeal.

And because this Court is properly loath to expand the collateral order doctrine through common law, such a defect should be fatal to Petitioner's argument here—and should therefore compel the conclusion that the Court of Appeals correctly dismissed Petitioner's interlocutory appeal.

CONCLUSION

For the foregoing reasons, *amici* respectfully suggest that the decision below be affirmed.

Respectfully submitted,

STEPHEN I. VLADECK
Counsel of Record
727 East Dean Keeton St.
Austin TX 78705
(512) 475-9198
svladeck@law.utexas.edu

SARAH E. HARRINGTON
Goldstein & Russell, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814

Counsel for Amici Curiae

February 20, 2018

APPENDIX

APPENDIX

List of *Amici Curiae* Federal Courts Scholars

(Institutional affiliations are provided for identification purposes only)

KEVIN M. CLERMONT
Ziff Professor of Law
Cornell Law School

LUMEN MULLIGAN
Associate Dean for Faculty and
Earl B. Shurtz Research Professor of Law
University of Kansas School of Law

PHILIP A. PUCILLO
Professor of Law in Residence
Michigan State University College of Law

JUDITH RESNIK
Arthur Liman Professor of Law
Yale Law School

CAPRICE ROBERTS
Professor of Law
Savannah Law School

ANDREW SIEGEL
Associate Professor of Law
Seattle University School of Law

MICHAEL E. SOLIMINE
Donald P. Klekamp Professor of Law
University of Cincinnati College of Law

ADAM N. STEINMAN
University Research Professor of Law
University of Alabama School of Law

JOAN E. STEINMAN
University Distinguished Professor and
Professor of Law
Chicago-Kent College of Law

STEPHEN I. VLADECK
A. Dalton Cross Professor in Law
University of Texas School of Law

HOWARD M. WASSERMAN
Professor of Law
FIU College of Law

No. 17-368

In The Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

v.

TESLA ENERGY OPERATION, INC., FKA SOLARCITY CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

LUKE A. WAKE
Senior Staff Attorney
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
921 11th St., Suite 400
Sacramento, CA 95814
(916) 448-9904
luke.wake@nfib.org

JAROD M. BONA
Counsel of Record
AARON R. GOTT
BONA LAW PC
4275 Executive Square, Suite 200
La Jolla, CA 92037
(858) 964-4589
jarod.bona@bonalawpc.com
aaron.gott@bonalawpc.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
INTERESTS OF *AMICUS CURIAE*	1
INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. COLLATERAL REVIEW MUST SERVE THE VALUES IMPLICATED BY THE STATE-ACTION IMMUNITY DOCTRINE	4
II. STATE-ACTION IMMUNITY DENIALS TO MARKET PARTICIPANTS DO NOT IMPLICATE A HIGH-ORDER VALUE	6
III. INTERLOCUTORY REVIEW WOULD IMPERIL A FUNDAMENTAL VALUE OF STATE-ACTION IMMUNITY	9
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 11

Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) 11

Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 12

City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991) 7

City of Lafayette v. Louisiana Power & Light Company, 435 U.S. 389 (1978) 7

FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216 (2013) 8

FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992) 9

Hoover v. Ronwin, 466 U.S. 558 (1984) 12

Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories, 460 U.S. 150 (1983) 7

Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965) 11

Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009) 6, 8

North Carolina State Bd. of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015) ..... *passim*

Parker v. Brown, 317 U.S. 341 (1943) 5

TABLE OF AUTHORITIES—Continued

Page

Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984) 11

Radovich v. Nat'l Football League, 352 U.S. 445 (1957) 11

S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) 5

United States v. California, 297 U.S. 175 (1936) 7

United States v. Topco Assocs., Inc., 405 U.S. 596 (1972) 2

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 11

STATUTES

Clayton Act, 15 U.S.C. § 26 11

Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 10

Sherman Act, 15 U.S.C. §§ 1 *et seq.* 3, 5, 7

INTERESTS OF *AMICUS CURIAE*

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center)[1] is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting them. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs

---

[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The petitioner's letter consenting to the filing of *amicus* briefs has been filed with the Clerk of Court. Respondent consented to the filing of this *amicus* brief by email from counsel of record.

in cases that will affect small businesses. NFIB Legal Center submits this *amicus curiae* brief because the case presents a matter of importance to the small business community. Specifically, NFIB Legal Center intends to highlight the larger implications of this case for businesses who bring antitrust claims against anticompetitive public enterprise actors.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

The state-action immunity is a limited and disfavored antitrust exemption singular in purpose: to respect state power to regulate as an act of government. Beyond its narrow exception, the federal antitrust laws remain supreme. When states or their non-sovereign subdivisions participate in the market, they must be subject to antitrust scrutiny just like other commercial actors.

The federal antitrust laws are the "Magna Carta of free enterprise" and are as important to the preservation of the interstate economy and economic liberty "as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). They "guarantee[] each and every business, no matter how small, [the] freedom to compete." *Id.*

This Court's jurisprudence has increasingly applied a functional approach to state-action immunity such that quasi-public market participants are subject

to antitrust scrutiny unless they can prove that the state as a sovereign has adopted and supervised their anticompetitive conduct. *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1114 (2015). Formalistic designations of an entity as "public" no longer matter. *Id.*; *see also* Resp. Br. 5 (SRP is a "nominal public entity" under Arizona law despite being one of the nation's largest electric utilities).

Treating these same actors differently than other competitors for collateral order purposes would impermissibly require federal antitrust enforcement to yield to hypothetical effects on state interests asserted by self-interested market participants while they continue to harm competition, consumers, and competitors.

1. Underpinning the state-action immunity—a statutory interpretation of the Sherman Act—is a balance that recognizes both the supremacy of the federal antitrust laws and the states' residual power to regulate. The collateral order analysis necessarily must consider whether interlocutory review serves this singular value.

2. The state-action immunity respects state power to regulate as an act of government, but it should not exempt anticompetitive conduct undertaken as a commercial market participant. Market participants, public and private, are inherently self-interested. The state-action immunity test is designed to ensure they do not have the freedom to abuse

state law authority for their own interests to the detriment of consumers and competition.

3. Allowing interlocutory appeals of state-action immunity denials would require the federal antitrust laws to yield in the face of doubtful—even dubious—claims of immunity by self-interested market participants. The collateral order doctrine should not elevate the interests of market participants above the congressional policy of rigorous antitrust enforcement.

4. Indeed, interlocutory review would imperil fundamental values implicated by the state-action immunity: it will delay and deter antitrust enforcement. Interlocutory appeals of state-action immunity will substantially increase the duration and cost of antitrust litigation, during which some competitors will go out of business or run out of money. All but the most well-funded litigants—large companies like Tesla—will be deterred from litigation.

ARGUMENT

I. COLLATERAL REVIEW MUST SERVE THE VALUES IMPLICATED BY THE STATE-ACTION IMMUNITY DOCTRINE

The collateral order exception should not apply to orders denying state-action immunity because the state-action immunity is only concerned with the careful balance between federal antitrust enforcement and state sovereignty—it is not concerned with the

interests of market participants even when they are acting at state direction.

The State Action Immunity. The state-action immunity is not an immunity, but rather a function of statutory interpretation—a merits question—that limits the substantive reach of the federal antitrust laws: Congress did not intend to preclude states from exercising their own power by enacting the Sherman Act. It is grounded in the concept of dual federalism: it respects the plenary power of Congress to regulate interstate commerce without denying the residual regulatory power of the states. *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61 (1985) ("*Parker* doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace.").

It is strictly limited and disfavored. The states' "power to attain an end does not include the lesser power to negate the congressional judgment embodied by the Sherman Act." *N.C. Dental Exam'rs*, 135 S. Ct. at 1111; *see also Parker v. Brown*, 317 U.S. 341, 351 (1943) (states cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it"). That congressional judgment represents a century-long commitment to the "fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws." *N.C. Dental Exam'rs*, 135 S. Ct. at 1110. This Court thus employs a strict test—requiring both a clear state policy to displace competition and active state

supervision—to ensure that federal antitrust law yields only where it imposes an "impermissible burden on the States' power to *regulate*." *Id.*

Collateral Order Doctrine. To be eligible for collateral review, "the entire category to which a claim belongs" must meet the necessary—but not sufficient—condition that "some particular value of a high order" would evade review if not considered immediately. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106-107 (2009).

Petitioner argues that this requirement is met by its "dignitary interest" and the effect litigation would have on its "ability to freely exercise [its] discretion." Pet'r Br. 31. Even if these were legitimate interests for *all* state-action immunity proponents to claim—and they are not—they are not the interests implicated by the state-action immunity.

II. STATE-ACTION IMMUNITY DENIALS TO MARKET PARTICIPANTS DO NOT IMPLICATE A HIGH-ORDER VALUE

A denial of the state-action immunity is eligible for collateral review only if the federalism value served by it would evade review (and where the other necessary elements of the doctrine are met). But that value is not implicated by giving a special route to early appellate review for a significant number of state-action immunity proponents (including the Petitioner in this case): commercial market participants.

Commercial Conduct Is Not Exempt. This Court's holdings have been consistent with the idea that the state-action immunity does not apply to market conduct. In *City of Lafayette v. Louisiana Power & Light Company*, 435 U.S. 389, 391 (1978), the Court rejected an argument that the antitrust laws are intended to protect the public from only private abuses and not local government activity. "Every business enterprise public or private, operates its business in furtherance of its own goals." *Id.* at 403.

In *Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories*, 460 U.S. 150, 154 (1983), it again applied this reasoning in rejecting an argument that "state purchases for the purpose of competing with private enterprise" were exempt from the Sherman Act. In separating commercial activity from traditional government functions, the Court explained it "is too late in the day to suggest that Congress cannot regulate states under its Commerce Clause powers when they are engaged in proprietary activities." *Id.* at 154 n.6. In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374-75 (1991), the Court reaffirmed that the federal antitrust laws apply "where the State acts not in a regulatory capacity but as a commercial participant in a given market."

The Supremacy Clause demands this limitation on the state-action immunity because the Commerce Clause assigns the power to regulate interstate commerce to Congress. *See United States v. California*, 297 U.S. 175, 184 (1936) ("The sovereign power of the states

is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.").

Nevertheless, the Court has not formally recognized a categorical market-participant exception to the state-action immunity. *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226 n.4 (2013). It need not do so now: the collateral order analysis focuses on "the entire category" of state-action immunity cases. *Mohawk*, 558 U.S. at 106. The Court should hold that the collateral order doctrine does not apply because interlocutory review would, in some cases, inappropriately elevate the interests of market participants over the congressional policy of robust antitrust enforcement.

Market Participants Are Self-Interested. Petitioner, like many antitrust defendants who raise the state-action immunity, is a non-sovereign actor and a commercial market participant who claims to have acted under the auspices of state law. As this Court has repeatedly recognized, these actors are not a substitute for the state: they are inherently self-interested such that their "private anticompetitive motives [blend] in a way difficult even for [them] to discern." *N.C. Dental Exam'rs*, 135 S. Ct. at 1111. Under a functional analysis, their conduct is not lightly attributed to that of the state, as sovereign.

Petitioner claims that it has a dignitary interest in avoiding burdensome antitrust litigation that would affect its discretion to act freely. Pet'r Br. 31. That is fundamentally incongruent with this Court's state-action immunity cases.

In fact, the state-action immunity is intended to discourage market participants from acting in their own interests or freely exercising their discretion. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992) ("[W]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.") (citation and internal quotations omitted); *see also N.C. Dental Exam'rs*, 135 S. Ct. at 1113 (*Ticor Title*'s reasoning applies to "any nonsovereign entity—public or private—controlled by active market participants"). It does not, under any circumstances, defer to them and their restraints. *See Ticor Title*, 504 U.S. at 633 ("Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint.").

For these reasons, the federalism value that the state-action immunity serves is not implicated when it is denied to a market participant.

III. INTERLOCUTORY REVIEW WOULD IMPERIL A FUNDAMENTAL VALUE OF STATE-ACTION IMMUNITY

Robust antitrust enforcement is essential to the national policy in favor of competition. It should not take a back seat to a lengthy interlocutory appeal process at the outset of litigation. Delay of legitimate antitrust enforcement alone would frustrate this policy by deterring litigation against market participants

who abuse state authority for their own competitive advantage.

Many of the litigants who challenge this conduct are, like NFIB members, small businesses who may not be able to afford another year of anticompetitive conduct through the appellate process. When they seek to enforce the federal antitrust laws against public market participant defendants, they do so because their market challenge is already failing due to the defendants' anticompetitive conduct.

If interlocutory appeals become available to market participants denied state-action immunity, those entities will obtain a virtually automatic year-long stay by asserting it, even if there isn't a legitimate basis to do so. It will also increase the cost of already-expensive antitrust litigation.

Moreover, because state-action immunity cases sometimes implicate bars to damages claims, *see, e.g.*, The Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36, as it does here, the plaintiffs' bar typically isn't interested in taking them on a contingency arrangement. Thus, the typical plaintiffs to antitrust actions against public entities are the businesses affected enough to seek mostly injunctive relief. If applied here, the collateral order doctrine would create an effective get-out-of-jail-free card from antitrust scrutiny for a significant number of quasi-public perpetrators. It would, in fact, raise the barriers to lawsuit sufficiently high that only the richest challengers—large companies like Tesla—would protect competition

by seeking relief for antitrust injury. The others would likely just go out of business.

The Clayton Act does "not merely . . . provide private relief, but [serves] the high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969). Through it, Congress expressed a policy that "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965). The policy is most effective where private antitrust litigation is "an ever-present threat to deter" anticompetitive conduct. *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984). This Court has thus rejected rules that would impede it. *Id.* (rejecting rule barring injunctive relief for mere threatened injury); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982) (discussing cases that rejected limitations on the policy).

"[T]his Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 547 (1983) (quoting *Radovich v. Nat'l Football League*, 352 U.S. 445, 454 (1957)). Interlocutory appeals would add an additional hurdle and substantially undermine the private enforcement that Congress relies upon to enforce federal competition policy. Some defendants whose immunity

denial is affirmed will get the benefit of a stay that allows them to continue their anticompetitive conduct at the expense of consumers and competition. That is a great cost to avoid speculative harm to state interests in cases where it is ultimately reversed.

"The national policy in favor of competition cannot be thwarted by casting [a] gauzy cloak of state involvement over" private anticompetitive conduct. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980). Applying the collateral order exception to state-action immunity denials would, in many cases, require just that: "private regulation . . . designed to confer monopoly profits on [defendants who should be denied the state-action immunity] at the expense of the consuming public" will continue while litigation seeking to enjoin their conduct is paused pending an interlocutory appeal. *North Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1111 (quoting *Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting)).

CONCLUSION

For the foregoing reasons, the NFIB Small Business Legal Center urges the Court to hold that the collateral order exception to the final judgment rule does not apply to denials of the state-action immunity.

Respectfully submitted,

JAROD M. BONA
Counsel of Record
AARON R. GOTT
BONA LAW PC
4275 Executive Square, Suite 200
La Jolla, CA 92037
(858) 964-4589
jarod.bona@bonalawpc.com
aaron.gott@bonalawpc.com

LUKE A. WAKE
Senior Staff Attorney
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
921 11th St., Suite 400
Sacramento, CA 95814
(916) 448-9904
luke.wake@nfib.org

Counsel for Amicus Curiae

No. 17-368

IN THE

Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

v.

SOLARCITY CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LISA SORONEN
Executive Director

STATE & LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

TILLMAN L. LAY*
KATHARINE M. MAPES
JESSICA R. BELL
AMBER L .MARTIN

**Counsel of Record*
SPIEGEL & MCDIARMID LLP
1875 Eye Street, N.W., Suite 700
Washington, D.C. 20006
(202) 879-4000
tim.lay@spiegelmcd.com

Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. Interlocutory appeal of a district court denial of state-action immunity serves fundamental principles of State sovereignty	5
II. Interlocutory appeal from the denial of state action immunity protects the public interest	8
A. Defending an antitrust lawsuit exposes governmental entities to substantial burden and expense	8
B. The inability to expeditiously appeal an adverse ruling on state-action immunity inhibits the ability of governmental entities to act in the public interest	11
C. Neither State nor local governments should be exposed to antitrust suits based on a perceived error in judgment or disagreement over policy	14
CONCLUSION	16
	19

TABLE OF AUTHORITIES

Page

FEDERAL COURT CASES

Active Disposal, Inc. v. City of Darien, 635 F.3d 883 (7th Cir. 2011) 9

All Am. Cab Co. v. Met. Knoxville Airport Auth., 547 F. Supp. 509 (E.D. Tenn. 1982), *aff'd*, 723 F.2d 908 (6th Cir. 1983) 10

Allright Colo., Inc. v. City & Cty. of Denver, 937 F.2d 1502 (10th Cir.), *cert. denied*, 502 U.S. 983 (1991) 10

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 12, 15

Campbell v. City of Chicago, 823 F.2d 1182 (7th Cir. 1987) 9

City Commc'ns, Inc. v. City of Detroit, 888 F.2d 1081 (6th Cir. 1989) 9

City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365 (1991) 5, 10-11

City of Lafayette v. La. Power & Light Co., 435 U.S. 389 (1978) 1, 5, 6

Cohen v. Beneficial Indust. Loan Corp., 337 U.S. 541 (1949) 4

Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40 (1982) 12

Exxon Corp. v. Maryland, 437 U.S. 117 (1978).....11

FERC v. Mississippi, 456 U.S. 742 (1982).....11

Grason Elec. Co. v. Sacramento Mun. Util. Dist., 770 F.2d 833 (9th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986).....10

Harlow v. Fitzgerald, 457 U.S. 800 (1982).....16

Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d 1111 (10th Cir. 1991).....9

Jones v. City of McMinnville, 244 F. App'x 755 (9th Cir.), *cert. denied*, 552 U.S. 890 (2007).....10

Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992).....13

Martin v. Mem'l Hosp. at Gulfport, 86 F.3d 1391 (5th Cir. 1996)..... 7-8, 12

Mercy-Peninsula Ambulance, Inc. v. San Mateo Cty., 791 F.2d 755 (9th Cir. 1986).....10

Mitchell v. Forsyth, 472 U.S. 511 (1985).....8

Nixon v. Mo. Mun. League, 541 U.S. 125 (2004).....5, 6

Osborn v. Haley, 549 U.S. 225 (2007).....8

Parker v. Brown, 317 U.S. 341 (1943) 1, 4, 5, 6, 11, 17

S. Disposal, Inc. v. Tex. Waste Mgmt., 161 F.3d 1259 (10th Cir. 1998).....9

Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985) 9

Springs Ambulance Serv., Inc. v. City of Rancho Mirage, 745 F.2d 1270 (9th Cir. 1984) 10

State of Tennessee v. FCC, 832 F.3d 597 (6th Cir. 2016) 6

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 6-7, 17

Will v. Hallock, 546 U.S. 345 (2006) 14

STATE COURT CASES

Miller's Pond Co., LLC v. City of New London, 873 A.2d 965 (Conn. 2005) 7

FEDERAL STATUTES

15 U.S.C. § 15 12

15 U.S.C. § 26 13

Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 11

STATE STATUTES

Ariz. Rev. Stat. Ann. § 30-811 (2017) 7

Ariz. Rev. Stat. Ann. § 30-812 (2017) 7

OTHER AUTHORITIES

130 Cong. Rec. 9554 (1984) 16

130 Cong. Rec. 22,430-36 (1984) 12, 14

C. Paul Rogers III, *Municipal Antitrust Liability in a Federalist System*, 1980 Ariz. St. L.J. 305 (1980) 6

Herbert Hovenkamp & John A. Mackeron III, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. Rev. 719 (1985) 11

John E. Lopatka, *State Action and Municipal Antitrust Immunity: An Economic Approach*, 53 Fordham L. Rev. 23 (1984) 17

Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L. J. 486 (1987) 17

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (4th ed. 2013) 7, 13

William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887 (2003) 15

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are national organizations representing elected and appointed officials of State and local governments. They represent governments and government officials in every State and of all sizes. *Amici* respectfully submit this brief to protect the ability of State and local governments to make decisions and craft policy for the benefit of their citizens, unencumbered by the threat of prolonged and costly antitrust litigation, and in accordance with principles of State sovereignty. *Amici* urge the Court to reverse the Ninth Circuit and find that a district court's denial of state-action immunity to a State or local government entity may be immediately appealed under the collateral order doctrine.[2]

The National Governors Association ("NGA"), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 States, three territories, and two commonwealths.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief.

[2] The Court first recognized state-action immunity in *Parker v. Brown*, 317 U.S. 341 (1943), applying the doctrine to a State actor. The Court considered whether state-action immunity extends to cities in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). In this brief, we use the term "governmental entities" to refer to State and local governments and their agencies, departments, subdivisions, districts, officers, and employees who may face antitrust claims and raise state-action immunity in accordance with the evolution of the doctrine.

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the nation's 50 States, its commonwealths, and its territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing State issues. NCSL advocates for the interests of State governments before Congress and federal agencies and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital State concern.

The Council of State Governments ("CSG") is the nation's only organization serving all three branches of State government. CSG is a region-based forum that fosters the exchange of insights and ideas to help State officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,400 cities. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and State supreme and appellate courts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

State-action immunity recognizes the constitutional importance in our system of federalism of giving governmental entities, responsive to their State and local electorates, sufficient latitude to enact laws, adopt policies, and take actions to promote the public welfare within their jurisdictions, without subjecting those decisions to scrutiny under the federal antitrust law. That law is an inherently ill-suited tool to regulate the conduct of governmental entities. It is also often an inappropriate one. Federal antitrust law can sometimes conflict with the

legitimate public interest objectives served by State law, and this Court made clear in *Parker* that in those cases, federal antitrust law must yield in order to respect those legitimate State law objectives. Subjecting the laws, policies, or actions of governmental entities to antitrust challenge should therefore be the exception, not the rule.

A district court's denial of state-action immunity to a governmental entity should be subject to interlocutory appeal under the collateral order doctrine. *See Cohen v. Beneficial Indust. Loan Corp.*, 337 U.S. 541, 546-47 (1949). Important federalism and policy considerations counsel in favor of allowing aggrieved governmental entities to pursue an interlocutory appeal. *First*, because the extension of state-action immunity to governmental entities is rooted in the State's own sovereign immunity, permitting interlocutory appeal is necessary to respect State sovereignty. *Second*, compelling governmental entities to endure trial court antitrust litigation to final judgment after denial of a state-action immunity motion exposes governmental entities and their taxpaying residents to enormous costs and risks. Those costs and risks will inevitably have a substantial chilling effect on the ability of a governmental entity to fulfill its obligation to promote the public welfare within its jurisdiction. And *third*, due to the checks and safeguards provided by their electoral accountability and transparency requirements, State and local governmental entities simply do not pose the same antitrust risks as private actors.

To give due comity to governmental entities in our system of federalism and to ameliorate the inherent chilling effect antitrust lawsuits may have on governmental entities' public welfare functions, a governmental entity should be permitted to appeal

an adverse district court decision on state-action immunity before being subjected to full trial court litigation on federal antitrust law claims. Accordingly, the judgment of the Ninth Circuit should be reversed.

ARGUMENT

I. Interlocutory appeal of a district court denial of state-action immunity serves fundamental principles of State sovereignty.

The state-action doctrine rests on the firm foundation of State sovereignty. As this Court recognized in *Parker*, "[i]n a dual system of government in which, under the Constitution, the States are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a State's control over its officers and agents is not lightly to be attributed to Congress." *Parker*, 317 U.S. at 351.

The extension of state-action immunity to the activities of political subdivisions of the State derives from the same "principles of federalism and state sovereignty." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 370 (1991). *See City of Lafayette*, 435 U.S. at 415 (recognizing that a municipality's actions implicate issues of State sovereignty when "it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of'" (quoting *City of Lafayette v. La. Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1976))). A State's municipal subdivisions "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004) (quoting *Wis. Pub.*

Intervenor v. Mortier, 501 U.S. 597, 607-608 (1991), and citing *Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 433 (2002)).

Indeed, "federal interference with local government action may impinge upon the sovereign right of the States to govern, assuming that the challenged activity is judicially determined to be necessary to the autonomy of the State." C. Paul Rogers III, *Municipal Antitrust Liability in a Federalist System*, 1980 Ariz. St. L.J. 305, 333 (1980). For that reason, the Court's "working assumption" is that "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power." *Nixon*, 541 U.S. at 140.

As the Sixth Circuit recently put it, "[a]ny attempt by the federal government to reorder the decision-making structure of a state and its municipalities trenches on the core sovereignty of that state." *State of Tennessee v. FCC*, 832 F.3d 597, 611 (6th Cir. 2016) (citing *Nixon*). The same principle lies at the heart of the Court's holding in *Parker* that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a State or its officers or agents from activities directed by its legislature." *Parker*, 317 U.S. at 350-51.

To be sure, non-State governmental entities "do not receive all the federal deference of the States that create them." *City of Lafayette*, 435 U.S. at 412. But the costs and burdens of an erroneous district court denial of state-action immunity to a local government is borne not just by the local government, but also by the State under whose auspices the local government is acting. After all, if the "clear articulation" standard is satisfied, *Town of Hallie v. City of*

Eau Claire, 471 U.S. 34, 43 (1985), it is the State that has authorized the local government's conduct to which state-action immunity adheres.[3]

As a result, whether the antitrust defendant is a State or one of its political subdivisions, compelling a governmental entity to defend an antitrust suit on the merits where that suit is later dismissed on state-action immunity grounds thwarts the State's sovereign authority. Such an antitrust trial impinges upon State sovereignty because, as is discussed in detail below, it has a chilling effect on a governmental entity's actions, forcing it to make decisions based not on its assessment of the public interest, but on the perceived costs and burdens of having that assessment challenged under the federal antitrust laws. Governmental entities faced with lengthy and expensive antitrust trials may find themselves with little choice but to settle, ceasing a challenged action they may have had every right to take. This is litigation at its most coercive, where it constitutes substantial interference with State sovereignty. *See Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391, 1395-96 (5th Cir. 1996) ("One of the primary justifications of state-action immunity is the same as that

---

[3] Additionally, if the local government's conduct is indeed problematic from the State's perspective, States "generally have all the necessary incentives and most generally do in fact provide adequate remedies." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 223 (4th ed. 2013). *See, e.g., Miller's Pond Co., LLC v. City of New London*, 873 A.2d 965, 976, 993 (Conn. 2005) (applying Connecticut statutory version of state-action immunity and concluding that plaintiffs had alleged "anticompetitive conduct well beyond the pale of the statutes"). Here, Arizona law provides clear statutory state court remedies for those who seek to challenge ratemaking decisions. Ariz. Rev. Stat. Ann. §§ 30-811, -812 (2017).

of Eleventh Amendment immunity—'to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" (quoting *P.R. Aqueduct v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993))).

Allowing interlocutory appeals of denials of state-action immunity thus protects State sovereignty in the same way as the state-action immunity doctrine itself, and is necessary to fulfill the purpose of the state-action doctrine.

II. Interlocutory appeal from the denial of state-action immunity protects the public interest.

Absent interlocutory appeal, the costs and risks of antitrust lawsuits threaten State and local budgets and distort governmental decision-making. *See Osborn v. Haley*, 549 U.S. 225, 238 (2007) (discussing *Cohen* criterion that "the District Court's disposition would be effectively unreviewable later in the litigation" (citing *Cohen*, 337 U.S. at 546)); *Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985) (looking at whether a right can "be effectively vindicated after the trial has occurred" (citing *Abney v. United States*, 431 U.S. 651 (1977))).

A. Defending an antitrust lawsuit exposes governmental entities to substantial burden and expense.

Plaintiffs may file antitrust lawsuits against governmental entities for carrying out a wide range of laws, policies, or actions, each of which may be specifically authorized by the State in question and all of which constitute important governmental functions. The end result is that governmental entities face the risk of antitrust suits from a variety of directions, all of which will bring costs and burdens.

Examples of core governmental functions that may make governmental entities a target for antitrust claims include:

- Providing sanitation and sewer services. *See Active Disposal, Inc. v. City of Darien*, 635 F.3d 883 (7th Cir. 2011) (challenging exclusive contracts for collection and disposal of waste); *S. Disposal, Inc. v. Tex. Waste Mgmt.*, 161 F.3d 1259 (10th Cir. 1998) (suit against city and successful bidder on garbage hauling contract);
- Licensing taxi cabs and regulating taxi rates. *See Campbell v. City of Chicago*, 823 F.2d 1182 (7th Cir. 1987) (challenging city ordinance regulating taxicab licenses);
- Regulating land use and zoning. *See Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111 (10th Cir. 1991) (challenging denial of rezoning request); *Scott v. City of Sioux City*, 736 F.2d 1207 (8th Cir. 1984) (challenging restriction of commercial development in outlying areas to promote urban renewal), *cert. denied*, 471 U.S. 1003 (1985);
- Granting franchises to install private commercial facilities in municipal streets and rights-of-way. *See City Commc'ns, Inc. v. City of Detroit*, 888 F.2d 1081 (6th Cir. 1989) (challenging award of a non-exclusive franchise to construct, operate, and maintain cable television system);

- Operating public transportation. *See Allright Colo., Inc. v. City & Cty. of Denver*, 937 F.2d 1502 (10th Cir.) (challenging municipal imposition of fees on commercial operators that exempted city-operated shuttle service), *cert. denied*, 502 U.S. 983 (1991); *All Am. Cab Co. v. Met. Knoxville Airport Auth.*, 547 F. Supp. 509 (E.D. Tenn. 1982) (challenging monopolization of airport ground transportation), *aff'd*, 723 F.2d 908 (6th Cir. 1983);
- Annexing unincorporated territories. *See Jones v. City of McMinnville*, 244 F. App'x 755 (9th Cir.) (challenging city's refusal to annex land and provide services), *cert. denied*, 552 U.S. 890 (2007);
- Lighting streets. *See Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 770 F.2d 833 (9th Cir. 1985) (challenging public entity's monopoly on market for electrical distribution systems and street and outdoor lighting systems), *cert. denied*, 474 U.S. 1103 (1986); and
- Providing emergency services, such as ambulances. *See Mercy-Peninsula Ambulance, Inc. v. San Mateo Cty.*, 791 F.2d 755 (9th Cir. 1986) (suit against county for granting of exclusive contracts for paramedic services); *Springs Ambulance Serv., Inc. v. City of Rancho Mirage*, 745 F.2d 1270 (9th Cir. 1984) (challenging city ambulance service).

Indeed, most State or local laws, policies or actions inevitably impact private commercial or economic interests in some way. "The fact is that virtu-

ally all regulation benefits some segments of the society and harms others[.]" *Omni Outdoor Advert.*, 499 U.S. at 377. Essentially any State or local regulation that excludes a particular entity from doing business, or even raises its costs of doing business, could be susceptible to challenge as an alleged antitrust violation. *See Exxon Corp. v. Maryland*, 437 U.S. 117, 133 (1978) (describing conflict between state actions and "our 'charter of economic liberty'" (quoting *N. Pac. R. Co. v. U.S.*, 356 U.S. 1, 4 (1958))); Herbert Hovenkamp & John A. Mackeron III, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. Rev. 719, 721 (1985).

Some State and local actions are particularly susceptible to antitrust challenge. The very nature of actions such as the regulation of private commercial use of municipal streets and rights-of-way, or the "quintessential State activity" of "land use [regulation]," *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982), may necessarily impede or restrict private commercial entities' ability to undertake their desired business activities. *See, e.g., Omni Outdoor Advert.* (municipal zoning ordinance restricting billboards immune from antitrust liability under *Parker*). And there may be some areas where governmental entities decide that the public interest is best served by government, rather than private, provision of a service. Governmental entities, then, are placed in the position of having to weigh the performance of basic governmental services and functions against the risk that they will be sued for violation of antitrust laws.

Congress recognized, and ameliorated, some of this potential exposure with the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 ("LGAA"). The LGAA was a response to the Court's decision in

Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982), which had left municipalities exposed to the risk of treble-damages claims under Section 4 of the Clayton Act, 15 U.S.C. § 15. Congress understood that over 200 antitrust cases had been filed against local governments in just the two short years since *Boulder*. 130 Cong. Rec. 22,436 (1984); *see also id.* at 22,431 (estimating 300 pending cases). In one post-*Boulder* case, a jury awarded a developer $9.5 million in damages against local government entities in a suit where the developer desiring access to a county sewer system alleged that the discretionary denial of its request violated the Sherman Act. *Id.* at 22,433. The damage award, automatically trebled to $28.5 million, represented 6,000 percent of the property tax collected by the village in the prior year. *Id.* Presented with an overwhelming need to address these kinds of antitrust treble-damage awards against local governments, Congress responded in the LGAA by prohibiting them.

To be sure, the LGAA preserved injunctive relief as a remedy for successful plaintiffs in antitrust cases against local governments. But the LGAA nevertheless represents "Congress endors[ing] and expand[ing] the state action doctrine." *Martin*, 86 F.3d at 1397. That is, the LGAA reflects Congress' recognition of the burden antitrust lawsuits place on local governments and the need for a change in judicial course to minimize that burden.

Even after the LGAA, defending antitrust lawsuits poses significant costs and risks on local governments. The cost of defending an antitrust claim in the trial court if state-action immunity is denied is substantial. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-60 (2007) (recognizing that "proceeding to antitrust discovery can be expensive"). Often, local

governments must retain costly, specialized outside antitrust counsel to handle these cases, especially if the trial court rejects the state-action doctrine defense and the case proceeds through discovery and even trial. In such cases, a governmental entity's legal defense costs can run into the millions of dollars. Moreover, because the LGAA left intact the possible award of attorney's fees to prevailing plaintiffs in injunctive actions under Section 16 of the Clayton Act, 15 U.S.C. § 26, if an early state-action immunity motion is denied, a governmental entity must also weigh the ongoing, uncertain risk of potential liability for the antitrust plaintiff's attorney's fees. *See Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 n.14 (9th Cir. 1991) (recognizing the possibility that a governmental entity may have to pay costs and attorney's fees to a plaintiff who "substantially prevails" under 15 U.S.C. § 26), *cert. denied*, 502 U.S. 1094 (1992); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 223 (4th ed. 2013). Thus, the combined cost of the governmental entity's own legal fees, plus the risk of fee-shifting if the plaintiff were ultimately to obtain injunctive relief, could easily expose a governmental entity antitrust defendant to monetary liability in the many millions of dollars.

Nor is that the only cost to governmental entities of antitrust litigation. They also face the diversion of limited staff resources and time to the litigation. The combination of these factors means that, absent interlocutory review of denial of state-action immunity, a governmental entity will face substantial additional costs and burdens that can never be undone, even if it is ultimately determined on appeal that the

governmental entity is entitled to state-action immunity.

B. The inability to expeditiously appeal an adverse ruling on state-action immunity inhibits the ability of governmental entities to act in the public interest.

The substantial costs and burdens of antitrust litigation chill the ability of governmental entities to fulfill their primary mission: to respond to the needs and interests of their residents and taxpayers and to promote the public welfare. In ruling that an interlocutory appeal "is not necessary to guarantee meaningful appellate review of an order denying state-action immunity," Pet. App. 11a n.4, the Court of Appeals failed to appreciate this critical consideration. The chilling effect of antitrust litigation will, in fact, push many governmental entities to settle, negating meaningful appellate review in many cases.

The collateral order doctrine protects "not mere[ly the] avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest." *Will v. Hallock*, 546 U.S. 345, 353 (2006). Denying governmental entities the ability to expeditiously appeal an adverse ruling on state-action immunity threatens their ability to serve the public interest as they see fit. Indeed, "[t]he mere threat of an antitrust lawsuit can divert elected officials from a course of action they believe would best serve the public interest." 130 Cong. Rec. 22,430 (1984).

In addition to influencing governmental entities' actions before litigation occurs, the inability of such entities to seek immediate appellate review of the denial of state-action immunity may effectively coerce them into settlements contrary to the public interest. A governmental entity may well find it better, following a trial court's denial of state-action

immunity, to settle a case rather than endure the substantial costs and risks of ongoing trial court antitrust litigation. *See Twombly*, 550 U.S. at 559 (noting that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings"). As one commentator has noted, "Once [an antitrust] claim has survived a motion to dismiss, a plaintiff often can credibly threaten to impose significant costs on the defendant through wide-reaching discovery." William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887, 1889 (2003).

To avoid substantial cost exposure to its taxpayers, a governmental entity might settle the case with a stipulated injunction prohibiting the enforcement of the ordinance, policy, or action at issue, plus perhaps a monetary payment to plaintiff in settlement of plaintiff's potential attorney's fees claims. Thus, the LGAA notwithstanding, the costs and uncertainties of litigating an antitrust suit without interlocutory appeal could force a governmental entity to forfeit the public interest that would have been served by the challenged action—even where, on appeal, plaintiff's claim ultimately might well have been found to have been barred by the state-action doctrine.

In other words, failure to permit interlocutory appeal can render the district court's denial of state-action immunity effectively unreviewable. It also would undermine an important public interest—a governmental entity's ability to achieve legitimate public policies, as authorized by the sovereign State under whose auspices the governmental entity was formed.

The result is the distortion of State and local governments' decision-making processes. And that distortion arises directly from the failure to allow governmental entities to appeal immediately a district court's adverse decision on state-action immunity.

This Court has long recognized that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (quotation marks omitted) (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)). Congress has likewise expressed its concerns over the chilling effect that potential antitrust liability has on State and local governments' decision-making:

> With [*Boulder*], [a] dark cloud of uncertainty descended over local governments and cast a deep shadow over the validity of almost every municipal action, including those actions which are clearly legitimate governmental functions . . . necessary for the well-being of the public.

130 Cong. Rec. 9554 (1984). This "dark cloud" will persist so long as governmental entities face the prospect of lengthy antitrust discovery and trial on the merits before they can find out whether they are protected by state-action immunity.

C. Neither State nor local governments should be exposed to antitrust suits based on a perceived error in judgment or disagreement over policy.

Unlike private, profit-maximizing entities, State and local governmental entities are charged with

promoting consumer welfare and are subject to democratic self-correction by their electorates. *See* John E. Lopatka, *State Action and Municipal Antitrust Immunity: An Economic Approach*, 53 Fordham L. Rev. 23, 58 (1984). And also unlike private sector entities, State and local governments are subject to open meeting and open records laws, further protecting against abuse. *See Town of Hallie*, 471 U.S. at 45 n.9 (noting that municipalities are often "subject to 'sunshine' laws or other mandatory disclosure regulations, and municipal officers, unlike corporate heads, are checked to some degree through the electoral process"). As the Court has explained:

> Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding State goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated State policy.

Id. at 47.

Moreover, state-action immunity rests on the premise that the Sherman Act was not "intended to restrain state action or official action directed by a state," but instead "must be taken to be a prohibition of individual and not state action." *Parker*, 317 U.S. at 351, 352. For that reason, "[t]he judiciary should not interfere under the aegis of the antitrust laws with a state's political decision, however misguided it may be, to substitute regulation for the operation of the market." Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L. J. 486, 487-88 (1987).

These inherent differences between governmental and private sector actors present very different concerns and risks under the antitrust laws in general, and the state-action doctrine in particular. Compelling State and local governmental entities to endure the substantial costs and risks of trial court antitrust litigation rather than permitting an immediate appeal of a trial court's adverse state-action doctrine decision has the inherent, and undemocratic, result of chilling State and local governments' decision-making, driving them to avoid enacting policies that might otherwise further legitimate public interests. The only way to avoid this chilling effect is to permit interlocutory appeals of trial court denials of state-action immunity.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

LISA SORONEN
Executive Director

STATE & LOCAL
LEGAL CENTER
444 North Capitol
Street, N.W.
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

TILLMAN L. LAY*
KATHARINE M. MAPES
JESSICA R. BELL
AMBER L. MARTIN

**Counsel of Record*
SPIEGEL & MCDIARMID LLP
1875 Eye Street, N.W.
Suite 700
Washington, D.C. 20006
(202) 879-4000
tim.lay@spiegelmcd.com

January 22, 2018

No. 17-368

IN THE

Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

v.

TESLA ENERGY OPERATIONS, INC., FKA SOLARCITY CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENT

SEAN M. SHERMAN
Counsel of Record
ALLISON M. ZIEVE
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
ssherman@citizen.org
Attorneys for Amicus Curiae

February 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The collateral order doctrine is a narrow exception to the final judgment rule 4

II. Denial of a motion to dismiss based on *Parker* is not an appealable final order 6

A. To be immediately appealable, a collateral order must be "effectively unreviewable" after final judgment. 6

B. Like the *Monell* doctrine, *Parker* is a defense to liability, not a right to avoid trial. 10

C. Awaiting final judgment to appeal denial of a motion to dismiss based on *Parker* does not imperil an important right of substantial public interest. 15

III. Denial of a motion to dismiss based on *Parker* is generally not "conclusive." 19

A. Whether and how the "active supervision" requirement applies turns on facts. 20

B. A decision denying a motion to dismiss based on the absence of active supervision for a nominal public entity is often not the district court's final decision on the issue. .. 23

CONCLUSION 27

TABLE OF AUTHORITIES

Cases	Page(s)
Ball v. James, 451 U.S. 355 (1981)	24
Butz v. Economou, 438 U.S. 478 (1978)	14
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)	21
Carson v. American Brands, Inc., 450 U.S. 79 (1981)	4
City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991)	12, 13, 20
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)	13, 16
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	*passim*
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)	18, 20
Cunningham v. Hamilton County, 527 U.S. 198 (1999)	20
Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994)	*passim*
Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981)	20
Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988)	20, 26

Johnson v. Jones,
515 U.S. 304 (1995) 25

Lauro Lines s.r.l. v. Chasser,
490 U.S. 495 (1989) 8, 9

Leatherman v. Tarrant City Narcotics Intelligence & Coordination Unit,
507 U.S. 163 (1993) 16

Messerschmidt v. Millender,
565 U.S. 535 (2012) 14

Mitchell v. Forsyth,
472 U.S. 511 (1985) ..... *passim*

Mohawk Industrial Inc. v. Carpenter,
558 U.S. 100 (2009) 8, 15

Monell v. Department of Social Services,
436 U.S. 658 (1968) ..... *passim*

Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,
460 U.S. 1 (1983) 26

North Carolina State Board of Dental Examiners v. Federal Trade Commission,
135 S. Ct. 1101 (2015) ..... *passim*

Owen v. City of Independence,
445 U.S. 622 (1980) 11, 17, 18, 19

Parker v. Brown,
317 U.S. 341 (1943) ..... *passim*

Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.,
506 U.S. 139 (1993) 5, 16

Richardson-Merrell, Inc. v. Koller,
472 U.S. 424 (1985) 6

South Motor Carriers Rate Conference, Inc. v. United States,
471 U.S. 48 (1985) 11

Swint v. Chambers County Commission,
514 U.S. 35 (1995) ..... *passim*

Town of Hallie v. City of Eau Claire,
471 U.S. 34 (1985) ..... *passim*

United States v. Hollywood Motor Car Co.,
458 U.S. 263 (1982) 4

Will v. Hallock,
546 U.S. 345 (2006) ..... *passim*

Will v. Michigan Department of State Police,
491 U.S. 58 (1989) 12, 16

Ex Parte Young,
209 U.S. 123 (1908) 16

Statutes and Rules

9 U.S.C. § 16(a)(1)(A) 5

28 U.S.C. § 1291 ..... *passim*

28 U.S.C. § 1292(b) 4, 5

28 U.S.C. § 1292(e) 5

28 U.S.C. § 2072(c) 5

42 U.S.C. § 1983 ..... 11, 16, 19

Local Government Antitrust Act,
15 U.S.C. §§ 34-36 ..... 18, 19

Miscellaneous

Brief for the United States as Amicus Curiae,
SolarCity Corp. v. Salt River Project Agricultural Improvement & Power District,
859 F.3d 720 (9th Cir. 2017) (No. 15-17302) 5

INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a national consumer advocacy organization founded in 1971. Public Citizen appears on behalf of its members and supporters before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen has a strong interest in preventing the unwarranted expansion of defenses that shield anticompetitive practices that harm consumers and often represents consumer interests in litigation before this Court.[2]

Public Citizen also has a longstanding interest in the proper construction of statutory provisions and common-law rules defining and limiting the jurisdiction of federal trial and appellate courts, including this Court. Public Citizen has frequently appeared as an amicus before this Court in cases involving significant issues of federal jurisdiction, including questions of original, removal, and appellate jurisdiction.[3]

---

[1] This brief was not written in whole or in part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Both petitioner and respondent have consented in writing to the filing of this brief.

[2] *See, e.g.*, *N.C. State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).

[3] *See, e.g.*, *Cyan v. Beaver Cty. Empls. Ret. Fund*, No. 15-1439 (pending); *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014); *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007). In addition, Public Citizen Litigation Group was also counsel for the respondent in *Will v. Hallock*, 546 U.S. 345 (2006).

Public Citizen submits this brief to explain why the collateral order doctrine does not authorize interlocutory appellate jurisdiction over district court decisions denying motions to dismiss based on a defendant's failure to satisfy the "state-action" defense to antitrust liability that this Court announced in *Parker v. Brown*, 317 U.S. 341 (1943). A contrary holding would risk expanding the collateral order doctrine beyond the "small class," *Will v. Hallock*, 546 U.S. 345, 349 (2006), of interlocutory orders currently authorized for immediate appellate review.

SUMMARY OF ARGUMENT

The collateral order exception to the final judgment rule authorizes interlocutory appeals from a small category of orders: those that conclusively determine disputed questions, resolve important issues completely separate from the merits of the action, *and* are effectively unreviewable on appeal from a final judgment. In this case, the question is whether a district court decision denying a motion to dismiss based on the so-called *Parker* state-action defense to antitrust liability is among this small category. As explained below, it is not.

Parker held that actions properly attributable to states are not subject to the Sherman Act. *Parker*, 317 U.S. at 350-51. Accordingly, a motion to dismiss a Sherman Act claim under *Parker* is based on the argument that the conduct alleged in the complaint did not violate the Act. An order denying a motion to dismiss under *Parker*, like denial of any motion to dismiss, is an interlocutory order. Unlike the few such denials that qualify for appeal under the collateral order doctrine, an order declining to dismiss a case

under *Parker* is effectively reviewable after final judgment.

An order is effectively unreviewable only if the absence of immediate appellate review would imperil an important right of substantial public interest that cannot be vindicated on appeal from final judgment. When a court declines to dismiss a claim against a defendant, an appeal after final judgment will fully vindicate the defendant's rights unless the defendant has a right to be free, not only from liability but from trial, even if its conduct is unlawful.

Parker does not exempt a defendant from trial for unlawful conduct; where the defense applies, it is a basis for finding that the defendant's conduct is not unlawful at all. A district court's rejection of a *Parker* defense, like the rejection of a city's defense to municipal liability based on the argument that alleged wrongful conduct was not attributable to a city's policy, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1968), can be adequately vindicated on appeal from final judgment. Delaying appellate review of such a merits defense until after final judgment imperils no important right of substantial public interest. To the contrary, the interests put forth by petitioner here have all been rejected by this Court as grounds for allowing immediate appeal.

That denial of a motion to dismiss based on *Parker* can be effectively reviewed on appeal from a final judgment is sufficient to dispose of this case. Other reasons, however, also support denying an immediate appeal here. Denial of a motion to dismiss that turns on facts related to whether and how the *Parker* defense's requirement that anticompetitive conduct be actively supervised by the state applies to a specific

entity is inherently non-final and particularly ill-suited to collateral order review.

ARGUMENT

I. The collateral order doctrine is a narrow exception to the final judgment rule.

Since the first Judiciary Act of 1789, Congress has strictly limited appeals as of right within the federal courts to appeals from "final de[c]isions of the district court." 28 U.S.C. § 1291. The general rule is that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citations omitted).

The final judgment rule represents a prudent allocation of the courts' time and authority. By consolidating in one appeal all grounds for challenging a trial court's judgment, the rule avoids delay, promotes efficient judicial administration, and reduces the ability of litigants to harass opponents by engaging in a succession of time-consuming and costly appeals. And because many cases settle or are resolved on other grounds in favor of the potential appellant, the rule avoids many appeals entirely. For these reasons, "the policy of Congress embodied in [section 1291] is inimical to piecemeal appellate review of trial court decisions." *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982).

At the same time, Congress has made exceptions in situations where the final judgment rule embodied in section 1291 would "create undue hardship." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981). One such statute is 28 U.S.C. § 1292(b), which provides for

discretionary certification by the district court and discretionary acceptance by the court of appeals of important, non-final questions of law. Indeed, here, petitioner moved for certification under § 1292(b), although the district court exercised its discretion to deny the motion. Other statutes make exceptions to section 1291 for specific subjects, such as certain orders relating to arbitration. *See, e.g.*, 9 U.S.C. § 16(a)(1)(A). And this Court may, through the rulemaking process, designate categories of orders that may be appealed before final judgment and define the conditions under which such appeals may be permitted. 28 U.S.C. §§ 1292(e), 2072(c).

Where Congress or the rulemaking process has not provided for a specific exception to section 1291, this Court has allowed immediate appeals from only a "small class" of "collateral" interlocutory orders. *Will*, 546 U.S. at 349. The collateral order doctrine articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), imposes three "stringent" requirements for membership in that small class—the order must "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. at 349 (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993)).

In light of the language of section 1291 and the longstanding policy against piecemeal appellate review, this Court has "repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule." *Digital*, 511 U.S. at 868. Thus, "the conditions for collateral order

appeal [are] stringent," and "the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted, by a prompt appellate court decision." *Id.* (internal quotation marks and citation omitted).

II. Denial of a motion to dismiss based on *Parker* is not an appealable final order.

A. To be immediately appealable, a collateral order must be "effectively unreviewable" after final judgment.

"[W]hen asking whether an order is 'effectively' unreviewable if review is to be left until later," *Will*, 546 U.S. at 353, under *Cohen*'s third prong, this Court has explained that there must be "some particular value of a high order ... in support of the interest in avoiding trial," or some "compelling public ends ... that would be compromised by failing to allow immediate appeal." *Id.* at 352. The value at stake must be such that, "in the absence of an immediate appeal," it would be "irretrievably lost." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430-31 (1985).

The key teaching of the Court's recent cases applying this requirement is not, as petitioner asserts (at 28-30), that the necessity of invoking a right to avoid trial or some equivalent interest that cannot be vindicated after final judgment has been replaced by an ad hoc inquiry into whether an issue is sufficiently "important" to merit immediate appeal. Rather, the right must meet both criteria: It must be one that will be lost absent immediate appeal *and* must be important enough to displace the values incorporated in the final judgment rule. Where the interest said to

justify appeal is in avoiding trial, "it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest" that makes "an order 'effectively' unreviewable if review is to be left until later." *Will*, 546 U.S. at 353.

Thus, in *Digital*, the defendant argued that a district court decision vacating a settlement agreement was immediately appealable, because, in the defendant's view, the *only* requirement for satisfying *Cohen*'s third prong was a "right not to stand trial" that could not be vindicated absent immediate appeal—a right that the defendant claimed the settlement agreement provided. 511 U.S. at 871. This Court disagreed, explaining that the contention that the "right not to stand trial" is "sufficient as well as necessary" is not an "accurate distillation" of the Court's collateral order precedents. *Id.* Instead, the Court held that a defendant seeking an immediate appeal based on an asserted right not to stand trial must *also* establish "the 'importance' of the right asserted [as] an independent condition of appealability." *Id.* at 875. Accordingly, although a provision in the private agreement could be said to provide "immunity from suit," *id.* at 877, which would be lost without interlocutory review, immunity based on a settlement agreement did not "qualif[y] as 'important' in *Cohen*'s sense." *Id.* at 879.

Will reflects the same approach. In *Will*, the Court held that agents of the United States in a *Bivens* action were not entitled to interlocutory appellate review of a decision denying a motion to dismiss based on the judgment bar of the Federal Tort Claims Act because the importance prong was not satisfied. 546 U.S. at 355. The lesson of *Will* is not that a right not

to be tried is not *necessary* for interlocutory appeal, but that it is not *sufficient*. As the Court explained, "only some orders denying an asserted right to avoid the burden of trial qualify"; the entitlement to immediate appeal depends on a "*further* characteristic that merits appealability," namely, "the value of the interest that would be lost" without immediate appeal. *Id.* at 351–52 (emphasis added). Because the defense at issue involved the same interests served by "traditional res judicata," *id.* at 354, which has never "been thought to protect values so great that only immediate appeal can effectively vindicate them," *id.* at 355, the Court concluded that the asserted right to avoid trial was not important enough to merit immediate appeal, *see id.*

By contrast, in *Mohawk Industrial, Inc. v. Carpenter*, 558 U.S. 100 (2009), the Court found an important interest, but held that the collateral order doctrine did not apply because that interest could be vindicated after final judgment. There, the district court had ordered disclosure of material that the petitioner claimed was protected by the attorney-client privilege. The Court held that, although the "right not to disclose [attorney-client] privileged information" is "important," *id.* at 108, the right does not satisfy *Cohen*'s third prong because it is a right that can be protected in a postjudgment appeal "by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence," *id.* at 109.

Lauro Lines s.r.l. v. Chasser, 490 U.S. 495, 502 (1989), on which petitioner focuses, is fully consistent with the opinions discussed above, which hold that assertion of a right not to stand trial remains

necessary, but not sufficient, to satisfy the collateral order doctrine's requirement that an appeal of a denial of a motion to dismiss involve a right that is effectively unreviewable after final judgment. In *Lauro*, the Court unanimously held that denial of a motion to dismiss based on a forum selection clause was not immediately appealable under the collateral order doctrine because, as the Court's opinion stated, the right asserted was "different in kind" from a right to "avoid suit altogether," and thus failed to satisfy the third *Cohen* element. *Id.* at 501.

Justice Scalia joined the opinion of the Court and also wrote separately to note that *in addition* to considering whether the right would be imperiled by trial, the Court had also implicitly considered its importance. *Id.* at 502 (Scalia, J., concurring). Reasoning that the defendant arguably had a "right not to be tried" that would be irretrievably lost without an immediate appeal, Justice Scalia explained that the right was "not sufficiently important to overcome the policies militating against interlocutory appeals." *Id.* Although petitioner claims that Justice Scalia's concurrence marked a "turning point" in the collateral order doctrine, Pet. Br. 29, the concurrence did not imply that importance alone could render a ruling appealable. Rather, to be immediately appealable, the interlocutory ruling must involve a right that *not only* would be lost irreparably absent immediate appeal, but also is "*important enough* to be vindicated by, as it were, an injunction against its violation obtained through interlocutory appeal." *Id.* (emphasis added).

In sum, this Court has consistently required a defendant invoking the collateral order doctrine to

appeal a court's refusal to dismiss an action against it to show *both* that it has a right not to stand trial *and* that the right is important enough to overcome the strong policy against interlocutory appeals. Absent such a showing, the right does not satisfy the "effectively unreviewable" criterion.

Like the orders in the cases discussed above, an order denying a motion to dismiss under *Parker* does not satisfy this requirement. The *Parker* defense is neither a right not to be tried nor sufficiently important to "overpower the substantial finality interest § 1291 is meant to further." *Will*, 546 U.S. at 349. Rather, as discussed below, reliance on the *Parker* defense is an assertion that the defendant is not liable under the law and, in that way, resembles a run-of-the-mill motion for failure to state a claim. Like most such motions, denial of a *Parker* motion to dismiss is effectively reviewable after a final judgment.

B. Like the *Monell* doctrine, *Parker* is a defense to liability, not a right to avoid trial.

"'[A] mere defense to liability' ... may be reviewed effectively on appeal from final judgment." *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 42, 44 (1995) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). This Court has never held that a defense whose essence is that the defendant's challenged conduct was not unlawful—a quintessential merits defense—can support a collateral order appeal. *Parker* is such a defense and, like the defense to municipal liability for civil rights violations this Court announced in *Monell*, 436 U.S. at 694, it can be adequately vindicated on appeal from final judgment.

Local governments are not immune from suit under 42 U.S.C. § 1983 for constitutional violations. *See Owen v. City of Indep.*, 445 U.S. 622, 650, 657 (1980). However, under *Monell*, "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents" based on *respondeat superior*. *Id.* To hold "the government as an entity ... responsible," a plaintiff must show that the injury was inflicted pursuant to some "policy or custom." *Id.* *Monell* provides local governments a defense to § 1983 liability in circumstances where this Court has determined that they have not behaved unlawfully.

In *Swint*, this Court held that denial of a public entity's *Monell* defense is not immediately appealable under the collateral order doctrine. 514 U.S. at 42-43. Rejecting the argument that *Monell* "should be read to accord local governments a qualified right to be free from the burdens of trial," *id.* at 43, this Court held that the nonexistence of a government policy or custom "ranks as a 'mere defense to liability'" that "may be reviewed effectively on appeal from final judgment," *id.* (quoting *Mitchell*, 472 U.S. at 526).

Parker, like *Monell*, is a defense that limits the scope of certain defendants' liability, and it does so by limiting the circumstances in which they can be found to have behaved unlawfully under the Sherman Act. *See S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 71 (1985) ("In the *Parker* case, this Court held that the Sherman Act does not reach 'state action or official action directed by a state.'" (citation omitted)). In *Parker*, the Court considered whether a stabilization program designed by the California legislature to control the price of raisins was unlawful under the Sherman Act. 317 U.S. at

350. After assuming both that the California program "would violate the Sherman Act" if conducted by private persons, and that "Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce," the Court considered whether Congress had intended the Sherman Act to reach state action. *Id.*

In making this determination, the Court invoked what has subsequently become known as the "clear statement rule." *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) ("[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." (internal quotation marks and citations omitted)). In *Parker*'s words, "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351. After reviewing the text, legislative history, and purpose of the Sherman Act, the Court concluded that Congress had not explicitly manifested an intent that the Act apply to the states and, therefore, held that the Sherman Act does not apply to state action. *Id.* at 350-51; *see City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 374 (1991) (describing *Parker* as holding that "the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators"). Under *Parker*, anticompetitive actions of substate public entities, and even private entities, may also fall outside the Sherman Act's prohibitions if they (1) are authorized by an affirmative state policy to displace competition and (2) are either actively supervised by

the state or engaged in by municipalities, which the Court has excused from the active supervision requirement. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39-40, 46-47 (1985).

Petitioner and its amici insist that because the word "immunity" has sometimes been used to describe the *Parker* defense, it necessarily follows that an order denying a motion to dismiss on *Parker* grounds is appealable. But the word "immunity" is not a talisman that automatically enables a collateral order appeal, and all defenses that can be termed immunities are not identical. Importantly, *Parker* did not hold state actors immune from trial for unlawful conduct, or even from liability for unlawful conduct. It held that, because their conduct is not covered by the Sherman Act when the requirements of the defense are satisfied, it is not unlawful at all.[4]

The *Parker* defense is thus fundamentally different from "immunities" for which collateral order appeals are available. The kinds of "immunities" that have given rise to proper collateral order appeals are "a rare form of protection," *Digital*, 511 U.S. at 880, that provide a defendant with an exemption from trial

---

[4] Notably, although courts today sometimes use the shorthand term "*Parker* immunity," *Parker* itself did not use the word "immunity." And as the United States has noted, this Court first used the term "*Parker* immunity" in 1978, more than thirty years after issuing the decision. *See* Brief for the United States as Amicus Curiae at 14-15 & n.3, *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720 (9th Cir. 2017) (No. 15-17302). The Court has alternatively referred to the "*Parker* defense." *See City of Columbia*, 499 U.S. at 372; *Hallie*, 471 U.S. at 39; *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 415 (1978).

for *unlawful* conduct, *see Mitchell*, 472 U.S. at 527-28 (describing qualified immunity as "an entitlement not to be forced to litigate the consequences" of allegedly unlawful conduct); *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (explaining that qualified immunity shields government officials from being held legally accountable for "allegedly *unlawful* official action" unless their conduct violates "clearly established statutory or constitutional rights." (internal quotation marks and citations omitted; emphasis added)); *Butz v. Economou*, 438 U.S. 478, 506 (1978) (describing absolute immunity for federal officials as an "exemption from personal liability for *unconstitutional* conduct" (emphasis added)).

In short, entities or officials cloaked with these "immunities" are exempt from being held accountable through trial for conduct that is unlawful. By contrast, conduct that falls within the *Parker* defense is not unlawful. As the Court held in *Swint*, 514 U.S. at 43, a defendant that argues that its conduct is not unlawful under the relevant statute does not claim a special exemption from the burdens of the legal process that could justify invocation of the collateral order doctrine. Rather, the assertion of such a defense is akin to any other assertion that the plaintiff has failed to state a claim that the defendant has engaged in actionable wrongful conduct. This Court has never held that such a claim merits an interlocutory appeal. *See Digital*, 511 U.S. at 873.

C. Awaiting final judgment to appeal denial of a motion to dismiss based on *Parker* does not imperil an important right of substantial public interest.

As explained above, even where a claimed right would arguably be lost without immediate appeal, "whether a right is ... 'effectively reviewable' simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Mohawk*, 558 U.S. at 106 (quoting *Digital*, 511 U.S. at 878-79). This Court has therefore limited application of the collateral order doctrine to instances where "delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" *Id.* (quoting *Will*, 546 U.S. at 352-53). "The crucial question ... is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Id.* at 108-09.

Where a right "has no claim to greater importance than the typical defense[,] ... an order rejecting the defense ... cries for no immediate appeal of right as a collateral order." *Will*, 546 U.S. at 355. As discussed above, *Parker*, like *Monell*, is a defense "merely that the complaint fails to state a claim," which "can be made in virtually every case." *Digital*, 511 U.S. at 873. To extend the definition of "importance" to this situation would mean that, "[i]n effect, 28 U.S.C. § 1291 would fade out whenever the Government or an official lost an early round that could have stopped the fight." *Will*, 546 U.S. at 353 (denying application

of the collateral order doctrine for government officials on grounds unrelated to qualified immunity).

Petitioner's invocation of "state sovereignty and federalism," Pet. Br. 32-35, is inapposite because cities and other substate and private entities that typically invoke *Parker* "are not themselves sovereign." *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 412 (1978); *see also Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993) ("[U]nlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983."); *Mich. Dep't of State Police*, 491 U.S. at 70 (noting that "States are protected by the Eleventh Amendment while municipalities are not"); *Hallie*, 471 U.S. at 38.[5] In addition, petitioner's "state sovereignty and federalism" interests would be the same had it raised and the district court denied a defense that the court lacked personal jurisdiction, that the statute of limitations had run, or that the action was barred on claim preclusion principles—none of which is sufficient to invoke the collateral order doctrine. *Digital*, 511 U.S. at 873. And these

---

[5] State-level entities are also entitled to the *Parker* defense, but their *sovereign* interests are protected by Eleventh Amendment immunity against damages claims and the concomitant right to an interlocutory appeal when that immunity is denied. *See Metcalf & Eddy*, 506 U.S. at 147. By contrast, if a state-level defendant sought to appeal the denial of a *Parker* motion against an antitrust claim for injunctive relief not barred by sovereign immunity, *see Ex Parte Young*, 209 U.S. 123 (1908), it would have no greater claim to an immediate appeal than in a case where an action to enjoin an allegedly preempted state law was dismissed—a circumstance where an appeal would plainly be unavailable.

interests were equally present in *Swint*, where the Court rejected the application of the collateral order doctrine to a defense that, like the *Parker* defense, was specifically crafted to protect "instrumentalit[ies] of state administration." *Monell*, 436 U.S. at 696.

Similarly, deferring appellate review until final judgment will not imperil "government efficiency and effectiveness," Pet. Br. 35, or "impel[] officials toward decisions that minimize the prospect of their being sued rather than decisions that best advance the public interest," *id.* at 37. In the qualified immunity context, these concerns reflect the threat that "*personal* monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy." *Owen*, 445 U.S. at 655-56. This "interference with proper government operations" rationale "loses its force when it is the municipality, in contrast to the official, whose liability is at issue." *Id.* at 655; *see id.* at 656. Thus, while concerns about the impact of *individual* liability for civil rights violations have justified both creation of official immunity doctrines and application of the collateral order doctrine when such immunity is denied, *see Mitchell*, 472 U.S. at 528-29, municipalities facing similar claims have received only a merits defense that does not qualify for interlocutory appeal, *see Swint*, 514 U.S. at 42-43; *Owen*, 445 U.S. at 650. For the same reason, the prospect that substate entities may face antitrust liability does not create a sufficient prospect of distorting the judgment of their officers and employees to justify immediate appeal.

On the flip side, the potential impacts on the exercise of judgment by individual public officers and employees are ameliorated not only by the unlikelihood that they would be named as antitrust defendants individually, but also by the probability that many such individuals would be entitled to a defense against any monetary antitrust remedies under the Local Government Antitrust Act, 15 U.S.C. §§ 34-36, or to qualified immunity if they were employed by a public entity that did not meet that Act's definition of a "local government," *see N.C. State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1115-16 (2015) (explaining that application of the Sherman Act to a state agency should not affect citizen participation because "agency officials ... may ... enjoy immunity from damages liability"). The availability of such defenses for employees renders fears that individuals may be unwilling to serve or that their judgment may be clouded "totally unwarranted." *Owen*, 445 U.S. at 654 n.38.

Petitioner also invokes the high costs of antitrust litigation. Pet. Br. 37-38. This Court, however, has rejected the interest in avoiding litigation costs as an important public interest justifying an immediate appeal. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (denying the application of the collateral order doctrine to orders denying class certification). A contrary rule "would apply equally to the many interlocutory orders in ordinary litigation ... that may have such tactical economic significance that a defeat is tantamount to a 'death knell' for the entire case." *Id.* at 470. That the defendant here is a quasi-governmental entity, moreover, does not change the equation: The Court in *Will* made clear that the government's interest in "abbreviating litigation" is

insufficient to overcome the final judgment rule "whenever the Government ... lost an early round that could have stopped the fight." 546 U.S. at 354.

Finally, to the extent that petitioner's concern is that antitrust liability may motivate substate entities to take steps to avoid potential antitrust violations at the expense of "the public interest," Pet. Br. 37, its argument is not with the final judgment rule, but with Congress's judgment that the *Parker* defense permits such entities to be held liable (consistent with the significant limits imposed by the Local Government Antitrust Act, 15 U.S.C. §§ 34-36) when their anticompetitive behavior is not attributable to the state. *See N.C. State Bd.*, 135 S. Ct. at 1111 ("[U]nder *Parker* and the Supremacy Clause, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants."). As under civil rights statutes, "[c]onsideration of the municipality's liability for [Sherman Act] violations is quite properly the concern of its elected or appointed officials," and "a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with [statutory] mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury." *Owen*, 445 U.S. at 656 (discussing section 1983).

III. Denial of a motion to dismiss based on *Parker* is generally not "conclusive."

Although petitioner's failure to satisfy the requirement that an appealable collateral order be effectively unreviewable after final judgment is

decisive here, it is not the only element of the *Cohen* doctrine pertinent to the outcome. An interlocutory order may be immediately appealed under the collateral order doctrine only if it "'conclusively determine[s] the disputed question,'" *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988) (quoting *Coopers & Lybrand*, 437 U.S. at 468), or, put another way, constitutes a "fully consummated decision," *Cohen*, 337 U.S. at 546. The conclusiveness requirement gives effect to Congress's determination that litigation is best managed at both the trial and appellate levels if the district courts are free from second-guessing by the appellate courts in the midst of litigation. *See Cunningham v. Hamilton Cty.*, 527 U.S. 198, 203-04 (1999); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).

Whether a nominally public entity like petitioner must satisfy the active supervision requirement of the *Parker* defense, and, if so, whether it has been satisfied, are determinations that turn on facts, as petitioner acknowledges. *See* Pet. Br. 22 (observing that "a defendant may sometimes fail this test on factual grounds"). Because of these factual questions, which cannot be definitively resolved at the dismissal stage, district court decisions denying motions to dismiss on this issue are not ordinarily conclusive.

A. Whether and how the "active supervision" requirement applies turns on facts.

Parker extends to actions of an entity that is not the state itself, but is acting under an affirmative state regulatory policy to displace competition, *City of Columbia*, 499 U.S. at 370, if it can demonstrate that its actions "are an exercise of the State's sovereign

power," *N.C. State Bd.*, 135 S. Ct. at 1110. In keeping with *Parker*'s "disfavored" use, *id.*, however, the Court has strictly limited the circumstances in which the defense is available to such entities, under a two-part test first set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980): "[F]irst, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct." *N.C. State Bd.*, 135 S. Ct. at 1112 (citation omitted).

The second prong, the requirement of active state supervision, "serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Hallie*, 471 U.S. at 46. Thus, where an entity can demonstrate that there is no "real danger that [it] is acting to further [its] own interests, rather than the governmental interests of the State," *id.* at 47, the Court has crafted a "narrow exception" that "excuse[s]" the actor from satisfying the active supervision requirement, *N.C. State Bd.*, 135 S. Ct. at 1112-13. For example, in *Hallie*, a prototypical city government with general regulatory powers, general electoral accountability, and no private price-fixing agenda, and that was not controlled by market participants, was excused from satisfying the active supervision requirement. *See Hallie*, 471 U.S. at 46-47.

Subsequently, in *North Carolina State Board*, this Court cautioned that *Hallie* does not mean that all nominally public entities are exempt from the active supervision requirement. 135 S. Ct. at 1113-14. Rather, because "[t]he need for supervision turns not

on the formal designations given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade," a public entity is only excused if it can show that, like a "*Hallie* city," it (1) is not "controlled by market participants," (2) is "electorally accountable," (3) has "general regulatory powers," and (4) has "no private price-fixing agenda." *Id.* at 1114. Because those entitled to the application of the *Parker* defense "will not lose it on the basis of ad hoc and *ex post* questioning of their motives for making particular decisions," this Court has stressed that it is "all the more necessary to ensure the conditions for granting [it] are met in the first place." *Id.* at 1113.

The "narrowness" of the exception to application of the active supervision requirement ensures that most non-state entities invoking the *Parker* defense must make an evidentiary showing of "[a]ctual state involvement" to qualify. *Id.* Whether the state has engaged in active supervision turns on "whether the State's review mechanisms provide 'realistic assurance' that a nonsovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.'" *Id.* at 1116 (citations omitted). Although "[i]n general ... the adequacy of supervision ... will depend on all the circumstances of a case," *id.* at 1117, this Court has identified several "constant requirements": The state supervisor (1) "must review the substance of the anticompetitive decision, not merely the procedures followed to produce it," (2) "must have the power to veto or modify particular decisions to ensure they accord with state policy," and (3) "the state supervisor may not itself be an active market participant." *Id.* at 1116-17. Because the "mere potential for state

supervision is not an adequate substitute for a decision by the State," *id.* at 1116 (internal quotation marks and citation omitted), these requirements put a substantial factual burden on the defendant.

In sum, because the right to invoke *Parker* "does not derive from nomenclature alone," courts must engage in "an objective, *ex ante* inquiry into nonsovereign actors' structure and incentives" before approving of the defense. *Id.* at 1113-14. This inquiry into whether the active supervision requirement applies and has been satisfied is necessarily fact-specific, looking to particular facts about a specific entity and its conduct, as well as the specific facts about the state's supervision of that entity.

B. A decision denying a motion to dismiss based on the absence of active supervision for a nominal public entity is often not the district court's final decision on the issue.

In *Cohen*, this Court explained that, because appellate courts exercise "a power of review, not one of intervention[,] [s]o long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." 337 U.S. at 546. Thus, to justify an interlocutory appeal of a collateral order, there must be, among other things, "nothing in the subsequent course of the proceedings in the district court that can alter the court's conclusion." *Mitchell*, 472 U.S. at 527. As petitioner recognizes, where a legal question "turns in part on the facts," Pet. Br. 18, a district court denial of a motion to dismiss on the issue is ordinarily not conclusive.

As explained above, with respect to public entities that are not prototypical "*Hallie* cities," the active

supervision inquiry will generally be particularly fact-intensive. The existence of factual issues as to both the nature of the defendant and the degree of state supervision will necessarily render district court decisions on these issues at the motion-to-dismiss stage tentative.

The course of this litigation illustrates these points. This Court long ago found that petitioner here differs in many respects from the kinds of entities it subsequently excused from the active supervision requirement in *Hallie*. *See Ball v. James*, 451 U.S. 355, 366 (1981). Petitioner is "essentially" a "business enterprise[], created by and chiefly benefiting a specific group of landowners," *id.* at 368, that "does not exercise [general] governmental powers," *id.* at 366, and that uses a property-based voting scheme that is not required to comply with the one-person, one-vote standard, *id.* at 366-67; *see id.* at 370.

Because these facts would appear to take petitioner outside the category of *Hallie* municipalities, respondent's complaint alleged that petitioner is not actively supervised by the state. J.A. 18 (¶42), 23 (¶65). Relying on *Parker*, petitioner moved to dismiss. Applying the standard applicable at the motion-to-dismiss stage, the district court denied the motion. And in doing so, the court alluded to the tentative nature of its decision by noting that respondent's allegations were "all that is necessary *at this stage*." Pet. App. 67a (emphasis added). When petitioner nonetheless appealed and sought a stay of proceedings in the district court, the court noted again that it "did not make a final decision on the state-action doctrine" and that petitioner could raise the issue again "at summary judgment." Pet. App.

33a n.7. And indeed, petitioner has done so. *See* Mot. for Summ. J. at 28-30, *SolarCity Corp. v. Salt River Proj. Agric. Improv. & Power Dist.*, No. 15-CV-00374 (D. Ariz. Oct. 13, 2017), ECF No. 287.

Where, as here, a nominal public entity quite unlike the prototypical "*Hallie* city" invokes the *Parker* defense, the fact-intensive nature of the inquiry will ordinarily require denial of the defense at the motion-to-dismiss phase. As the district court recognized, however, such a denial is not necessarily the court's "final" word on the issue, as the defendant is "free to raise" it again in a motion for summary judgment. Pet. App. 33a n.7. Such a "tentative" ruling, *Swint*, 514 U.S. at 42 (quoting *Cohen*, 337 U.S. at 546), does not satisfy the requirements for immediate review under the collateral order doctrine.

Petitioner claims that because this Court looks at "the class of claims, taken as a whole," the grounds for the district court's denial of the *Parker* defense in this case are irrelevant. Pet. Br. 17. To be sure, the Court "decide[s] appealability for categories of orders rather than individual orders." *Johnson v. Jones*, 515 U.S. 304, 315 (1995). But that observation by itself neither defines what category is at issue nor answers the question whether a particular order in a potentially appealable category is sufficiently conclusive to qualify for appeal. To make those determinations, this Court necessarily must look to the district court's opinion.

The nature of a district court's order is often critical to the Court's categorization of it for purposes of appeal. For example, although decisions denying qualified immunity based on a legal determination that there was a violation of "clearly established" law

are immediately appealable, *Mitchell*, 472 U.S. at 528-30, decisions denying qualified immunity based on sufficiency of the evidence are not, *see Johnson*, 515 U.S. at 313. Similarly, orders *granting* stays or dismissals pursuant to *Colorado River* abstention are immediately appealable, but orders *denying* the same stays or dismissals are not. *See Gulfstream*, 485 U.S. at 277-78 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)). Therefore, regardless of whether purely legal aspects of decisions involving the *Parker* defense could be considered "final" for purposes of the collateral order doctrine, *but see* Resp. Br. 48-53, the inherently fact-specific questions whether and how the active supervision requirement applies to a specific entity's unique conduct and the state's supervision of that conduct do not fit the bill. Here, the district court held that petitioner had failed to show—on the allegations of fact before the court—that it satisfied the active supervision requirement. That fact-specific decision, which the court noted was not "a final decision on the state-action doctrine," Pet. App. 33a n.7, does not fall into a category that satisfies the requirements for making an exception to the final order rule, and would be too tentative to be appealable even if it did.

In any event, if the "class of claims" here were, as petitioner urges, defined as "denials of motions to dismiss based on *Parker*," the fact that many such orders will be tentative, because they turn on factual issues related to active supervision, is a strong reason to deny appealability for the entire category. Because questions critical to most invocations of *Parker* inherently defy conclusive resolution at the motion-to-dismiss stage, denials of *Parker* motions to dismiss

should remain categorically ineligible for appeal under the collateral order doctrine.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

SEAN M. SHERMAN
Counsel of Record
ALLISON M. ZIEVE
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
ssherman@citizen.org
Attorneys for Amicus Curiae

February 2018

No. 17-368

In the Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

v.

SOLARCITY CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE STATES OF TENNESSEE, ARIZONA, ARKANSAS, COLORADO, GEORGIA, IDAHO, INDIANA, LOUISIANA, KANSAS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, OHIO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, WEST VIRGINIA, WISCONSIN, WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Herbert H. Slatery III
Attorney General and Reporter State of Tennessee

Sarah K. Campbell
Special Assistant to the Solicitor General and the Attorney General

Andrée S. Blumstein
Solicitor General
Counsel of Record

Jonathan David Shaub
Assistant Solicitor General

Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 532-3492
andree.blumstein@ag.tn.gov

Counsel for Amicus Curiae State of Tennessee

Additional Counsel Listed In Signature Block

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. Deferring Appellate Review of Denials of State-Action Immunity Imperils States' Sovereign Interests 5

A. The purpose of state-action immunity is to protect the States' sovereign interests 6

B. Protecting States' sovereignty is a "value of a high order" that warrants immediate appeal 8

C. State-action immunity and state sovereign immunity derive from the same principles and should be treated the same under the collateral order doctrine 12

D. The differences between state-action immunity and other immunities support, rather than undermine, the need for immediate appeal 15

II. Deferring Appellate Review of Denials of State-Action Immunity Impinges on States' Sovereign Power to Engage in Economic Regulation 20

A. State-action immunity furthers federalism principles by preserving States' sovereign authority to regulate their economies 20

B. Delaying appellate review of orders denying state-action immunity to public entities would undermine federalism principles 23

III. Deferring Appellate Review of Denials of State-Action Immunity Would Be Inefficient and Would Needlessly Increase Costs for States and the Judiciary 27

CONCLUSION 33

TABLE OF AUTHORITIES

CASES

Alden v. Maine,
527 U.S. 706 (1999) 11, 12, 13

Asahi Glass Co. v. Pentech Pharm., Inc.,
289 F. Supp. 2d 986 (N.D. Ill. 2003) 29

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 28

Bates v. State Bar of Arizona,
433 U.S. 350 (1977) 22

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 29, 30, 31

Bond v. United States,
134 S. Ct. 2077 (2014) 18, 19, 20

Bond v. United States,
564 U.S. 211 (2011) 10

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 7

Car Carriers, Inc. v. Ford Motor Co.,
745 F.2d 1101 (7th Cir. 1984) 30

City of Columbia v. Omni Outdoor Advert., Inc.,
499 U.S. 365 (1991) 22

City of Lafayette v. Louisiana Power & Light Co.,
435 U.S. 389 (1978) 7, 21, 23, 27

Cohen v. Beneficial Indus. Loan Corp.,
337 U.S. 541 (1949) 4, 5, 9, 18

Coleman v. Court of Appeals of Maryland,
566 U.S. 30 (2012) 14

Community Commc'ns Co. v. Boulder,
455 U.S. 40 (1982) 7

Commuter Transp. Sys. v. Hillsborough County Aviation Auth.,
801 F.2d 1286 (11th Cir. 1986) 24, 28

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 4

Corr Wireless Commc'ns, L.L.C. v. AT&T, Inc.,
893 F. Supp. 2d 789 (N.D. Miss. 2012) 31

Cory v. White,
457 U.S. 85 (1982) 16

Deak-Perera Hawaii, Inc. v. Dep't of Transp.,
745 F.2d 1281 (9th Cir. 1984) 22

Digital Equip. Corp. v. Desktop Direct, Inc.,
511 U.S. 863 (1994) 4, 9, 10, 19

Exxon Corp. v. Governor of Maryland,
437 U.S. 117 (1978) 21

F.T.C. v. Phoebe Putney Health Sys.,
568 U.S. 216 (2013) 8, 22

F.T.C. v. Ticor Title Insurance Co.,
504 U.S. 621 (1992) 7, 20, 23

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 24

Hoover v. Ronwin,
466 U.S. 558 (1984) 26

Jones v. Johnson,
26 F.3d 727 (7th Cir. 1994) 25

Lauro Lines s.r.l. v. Chasser,
490 U.S. 495 (1989) 9

Martin v. Memorial Hosp. at Gulfport,
86 F.3d 1391 (5th Cir. 1996) 18, 19

Mitchell v. Forsyth,
472 U.S. 511 (1985) 23, 24, 27

Mohawk Indus., Inc. v. Carpenter,
558 U.S. 100 (2009) ..... *passim*

Nespresso USA, Inc. v. Ethical Coffee Co. SA,
263 F. Supp. 3d (D. Del. 2017) 31

North Carolina St. Bd. of Dental Exam'rs v. F.T.C.,
135 S. Ct. 1101 (2015) ..... *passim*

Osborn v. Haley,
549 U.S. 225 (2007) 19

Parker v. Brown,
317 U.S. 341 (1943) ..... *passim*

Patrick v. Burget,
486 U.S. 94 (1988) 22

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) ... 6, 9, 11, 12, 13

SD3, LLC v. Black & Decker (U.S.) Inc.,
801 F. 3d (4th Cir. 2015) 30, 31

Segni v. Commercial Office of Spain,
816 F.2d 344 (7th Cir. 1987) 24

Seminole Tribe v. Florida,
517 U.S. 44 (1996) 16, 18, 19

South Carolina Board of Dentistry v. F.T.C.,
455 F.3d 436 (2006) 15

South Carolina v. North Carolina,
558 U.S. 256 (2010) 11, 18

Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) 20, 22, 23

Surgical Care Ctr. of Hammond v. Hosp. Serv. Dist. No. 1, 171 F.3d 231 (5th Cir. 1999) 19

Town of Hallie v. City of Eau Claire,
471 U.S. 34 (1985) 15, 16

United States v. Mississippi,
380 U.S. 128 (1965) 17

We, Inc. v. City of Philadelphia,
174 F.3d 322 (3d Cir. 1999) 24

Wickard v. Filburn,
317 U.S. 111 (1942) 5

Will v. Hallock,
546 U.S. 345 (2006) 4, 6, 8, 9, 14, 31

STATUTES

Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988) 19

OTHER AUTHORITIES

Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 Cal. L. Rev. 1567 (2017) 22, 26

Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 Va. L. Rev. 1387 (2016) 5, 6

Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* (4th ed. & 2015 Supp.) 5, 12, 25

Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667 (1991) 25

Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 Colum. Bus. L. Rev. 335 (2004) 21, 22

Manual for Complex Litigation, Fourth (2004) ... 29

Memorandum from Hon. Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354 (2000) 29

Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887 (2003) 29

5 C. Wright & A. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004) 30

INTEREST OF *AMICI CURIAE*

Amici Curiae—the States of Arizona, Arkansas, Colorado, Georgia, Idaho, Indiana, Louisiana, Kansas, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming[1]— have a significant interest in the outcome of this case because they have an interest in preserving their sovereign actions from the threat of unnecessary, costly antitrust litigation. *Amici* rely on various state agencies and other public entities, state and local, to implement economic policy. And this Court has recognized that those actions are immune from federal antitrust laws because States are a "sovereign" part of our Nation's "dual system of government." *Parker v. Brown*, 317 U.S. 341, 351 (1943). That immunity has little value to *Amici*, however, if they must endure the burden and indignity of defending an antitrust suit to final judgment before having the opportunity to appeal from an order denying a claim of immunity.

Amici take no position on the scope of state-action immunity or whether it is applicable on the facts of this particular case. *Amici*'s interest is limited to ensuring that their sovereign right to regulate free from the strictures of federal antitrust law is not threatened by an unduly cramped view of the sovereign interests protected by state-action immunity. *Amici* defend their state entities and officials in antitrust actions, and

---

[1] No counsel for any party authored this brief, in whole or in part, and no person or entity other than *Amici* contributed monetarily to its preparation or submission.

political subdivisions of *Amici* provide such a defense as well. When state-action immunity is wrongly denied by a district court, *Amici* have an interest in correcting that decision—and preserving their immunity—immediately.

SUMMARY OF THE ARGUMENT

The interests threatened by a denial of state-action immunity to a public entity warrant an opportunity for immediate appeal.

1. Deferring appellate review of this class of orders until final judgment compromises the sovereignty interests that animate state-action immunity.

State-action immunity originates in the sovereignty retained by the States in our federal system. And when an interest as valued as state sovereignty would be imperiled by delaying an appeal, this Court has recognized the need for an immediate opportunity to appeal. State-action immunity derives from the same principles of sovereignty as the sovereign immunity recognized in the Eleventh Amendment. A denial of state-action immunity should thus be treated in the same manner as a denial of sovereign immunity: as a threat to the sovereign interests of States. The distinctions on which courts of appeals have relied to justify treating a denial of state-action immunity differently than denials of other immunities are largely immaterial to the central concerns of the collateral order doctrine and, if anything, support an opportunity for immediate appeal.

2. Deferring appellate review of this class of orders until final judgment undermines the federalism principles that state-action immunity was intended to

serve by interfering with States' ability to regulate their economies.

State-action immunity furthers federalism principles by allowing States the freedom to adopt different models and methods for implementing their desired economic policies. But delaying appeals of orders denying state-action immunity until after final judgment will significantly interfere with that regulatory freedom, both by distracting officials from their duties and chilling their discretionary actions. And the uncertainty of the scope of the state-action doctrine exacerbates this effect, leaving States with two undesirable choices: either implement a policy choice with the risk that they will be subjected to burdensome litigation if state-action immunity is denied or forgo their preferred approach altogether.

3. Deferring appellate review of this class of orders until final judgment exposes States and other public entities to unnecessary costs and undermines judicial efficiency.

Antitrust litigation is enormously expensive and consumes significant resources of both litigants and the courts. State-action immunity protects States and state officials and other public entities from these costs. But an inability to appeal immediately from a denial of state-action immunity imposes all of these costs even in cases in which the actions in question are, in fact, sovereign state actions. Permitting an immediate appeal in this narrow class of cases would avoid these unnecessary costs and preserve States' limited fiscal resources. And doing so would enhance—not undermine—the judicial efficiency that the general requirement of finality serves to protect.

ARGUMENT

To be "final" under the collateral order doctrine, an order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (restating *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).

This brief focuses on the third element as applied in the context of this case: whether denial of a public entity's claim to state-action antitrust immunity is "effectively unreviewable" absent interlocutory appeal within the meaning of *Cohen*.

This third *Cohen* element, of course, is not satisfied just because there is a value in winning before trial, rather than after it. That is true for almost all defenses and defendants. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 872-73 (1994). "[W]hen asking whether an order is 'effectively' unreviewable" absent interlocutory review, it is "not mere avoidance of trial, but avoidance of a trial that would imperil a substantial public interest, that counts." *Will v. Hallock*, 546 U.S. 345, 353 (2006). The "decisive consideration" under *Cohen*'s third prong is thus whether an inability to seek immediate appellate review will "'imperil a substantial public interest' or 'some particular value of a high order.'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (quoting *Will*, 546 U.S. at 352-53).

As explained below, deferring appellate review of denials of state-action immunity to public entities would do just that.[2]

I. Deferring Appellate Review of Denials of State-Action Immunity Imperils States' Sovereign Interests

State-action antitrust immunity derives from state sovereignty. It "exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition." *North Carolina St. Bd. of Dental Exam'rs v. F.T.C.*, 135 S. Ct. 1101, 1110 (2015) ("*North Carolina Dental*"). As this Court adopted a more expansive view of the federal government's authority to regulate commerce, *see Wickard v. Filburn*, 317 U.S. 111, 125 (1942), it became apparent that this broader view of federal power could transform existing antitrust laws into a weapon to be used against States' sovereign acts of economic regulation, *see North Carolina Dental*, 135 S. Ct. at 1118 (Alito, J., dissenting); Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 Va. L. Rev. 1387, 1394

---

[2] The question this Court granted certiorari to review is limited to orders denying state-action immunity to public entities. Pet. i. *Amici* demonstrate why an incorrect denial of state-action immunity to public entities and public officials imperils important public interests and satisfies the final element of *Cohen* appealability. *See* Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* § 2.04[B], at 2-52 (4th ed. & 2015 Supp.) ("*Fundamentals of Antitrust Law*") ("The importance of *Parker*'s status as an immunity is particularly strong when the defendant is a government agency, subdivision, or government official carrying out duties."). *Amici* take no position on whether a denial of state-action immunity to a private entity satisfies *Cohen*'s final element.

(2016). At the first opportunity, however, this Court rejected that possibility and acted to preserve States' sovereignty. *See Parker v. Brown*, 317 U.S. 341, 351 (1943).

State action undertaken pursuant to the State's sovereign authority is thus immune from the operation of federal antitrust laws. *North Carolina Dental*, 135 S. Ct. at 1110. And a wrongful denial of that immunity subjects States and other public entities to the indignity of defending sovereign action through protracted litigation. This Court has already recognized that such an affront to sovereignty impinges on a "value of a high order" that warrants immediate appeal under the collateral order doctrine. *Will*, 546 U.S. at 352; *see Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-46 (1993).

A. The purpose of state-action immunity is to protect the States' sovereign interests.

In *Parker*, this Court recognized that subjecting state action to antitrust suit would be an affront to the federalism and dual sovereignty embedded in the Constitution. *See North Carolina Dental*, 135 S. Ct. at 1110. And it refused to hold that Congress had acted to interfere with state sovereignty in that way without an express indication it had intended to do so. *Parker*, 317 U.S. at 350-52. The Ninth Circuit focused myopically on this statutory reasoning in *Parker* to characterize state-action immunity as a doctrine not concerned with sovereignty. Pet. App. 6a-7a, 9a. But that approach overlooks the premise on which the statutory reasoning rested: State sovereignty is an integral part of the Constitutional structure. *See*

Parker, 317 U.S. at 351 ("[U]nder the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority[.]"); *North Carolina Dental*, 135 S. Ct. at 1110 ("[*Parker*] recognized Congress' purpose to respect the federal balance and to 'embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution.'" (quoting *Community Commc'ns Co. v. Boulder*, 455 U.S. 40, 53 (1982))).

This Court's decisions on state-action immunity since *Parker*, including its most recent pronouncements, have reiterated the doctrine's grounding in the state sovereignty protected by the federal structure of our Constitution. In early cases, the Court recognized that state-action immunity "preserves to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws," *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (plurality opinion), and is "grounded in our federal structure," *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980). A decade later, in *F.T.C. v. Ticor Title Insurance Co.*, the Court noted that state-action immunity was "adopted to foster and preserve the federal system," safeguards "freedom of action for the States," and "is conferred out of respect for ongoing regulation by the State." 504 U.S. 621, 633 (1992). And most recently, the Court has reiterated that state-action immunity is "premised on an understanding that respect for the States' coordinate role in government counsels against reading the federal antitrust laws to

restrict the States' sovereign capacity to regulate their economies and provide services to their citizens," *F.T.C. v. Phoebe Putney Health Sys.*, 568 U.S. 216, 236 (2013), and "exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition," *North Carolina Dental*, 135 S. Ct. at 1110.

State-action immunity thus preserves a fundamental aspect of our country enshrined in the Constitution: the right of a State to regulate as a sovereign. "States are sovereign, and California's sovereignty provided the foundation for the decision in *Parker*." *North Carolina Dental*, 135 S. Ct. at 1122 (Alito, J., dissenting) (internal citation omitted). The Ninth Circuit's cursory discussion of state-action immunity as a matter of statutory interpretation ignores these background principles.

B. Protecting States' sovereignty is a "value of a high order" that warrants immediate appeal.

The "decisive consideration" in whether an order should be immediately appealable is "whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" *Mohawk Indus.*, 558 U.S. at 107 (quoting *Will*, 546 U.S. at 352-53). A denial of state-action immunity is a denial of the sovereignty of state action. In denying state-action immunity, a court necessarily determines that the "actions in question" are not "an exercise of the State's sovereign power." *North Carolina Dental*, 135 S. Ct. at 1110. State sovereignty is a "value of a high order" that would be imperiled by delaying appellate review.

Indeed, this Court has already concluded as much. One of the "particular value[s] of a high order [that has been successfully] marshaled in support of the interest in avoiding trial" is "respecting a State's dignitary interests." *Will*, 546 U.S. at 352; *see also Puerto Rico Aqueduct*, 506 U.S. at 144-47. This Court's decision in *Puerto Rico Aqueduct* reflects a "judgment about the value" of state sovereignty, namely that it is "weightier than the societal interests advanced by the ordinary operation of the final judgment principles." *Digital Equip.*, 511 U.S. at 878-79.

The Ninth Circuit focused its inquiry on whether state-action immunity is an immunity from suit or an immunity from liability. Pet. App. 8a. But, as Petitioner explains, that distinction dates to an earlier era of this Court's collateral order jurisprudence. Pet. Br. 28-30. More recently, this Court has repeatedly admonished that such classifications are no more than conclusory labels about whether the right asserted meets the third prong of *Cohen*. *See Will*, 546 U.S. at 351-52; *Digital Equip.*, 511 U.S. at 871-72. Instead, after "comb[ing] for some further characteristic that merits appealability under *Cohen*," this Court in *Will* confirmed that the inquiry "boils down to 'a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement.'" *Id.* at 351-52 (quoting *Digital Equip.*, 511 U.S. at 878-79); *see also Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 502-03 (1989) (Scalia, J., concurring). That judgment—weighing the interest that would be imperiled by deferring an appeal against the costs of allowing immediate appeal of the category of relevant orders—is the "crucial question" in whether

a category of orders warrants immediate appeal. *Mohawk Indus.*, 558 U.S. at 108.

The Ninth Circuit never made the judgment necessary to answer this "crucial question." Rather than grappling with the interests underlying state-action immunity that might be imperiled, the court relied on conclusory labels. In so doing, the court characterized state-action immunity in a manner contrary to this Court's recent descriptions. The Ninth Circuit concluded that state-action immunity is *not* "a safeguard of state sovereign immunity," because, in part, "[t]he Supreme Court assumed in *Parker* that Congress could have blocked the challenged . . . regulation." Pet. App. 9a. But this Court has recently said just the opposite: State-action immunity "exists to avoid conflicts between state sovereignty" and federal antitrust laws because "[i]f every duly enacted state law or policy were required to conform to the mandates of the Sherman Act . . . federal antitrust law would impose an impermissible burden on the States' power to regulate." *North Carolina Dental*, 135 S. Ct. at 1109-10; *supra* Part I.A. The Ninth Circuit never considered that sovereignty in its analysis.

The state sovereignty protected by state-action immunity is thus the interest that must be weighed in considering whether to allow an immediate appeal. That calculus is an easy one. State sovereignty is "weightier than the societal interests advanced by the ordinary operation of final judgment principles." *Digital Equip.*, 511 U.S. at 878-79. This Court has repeatedly held in high esteem the sovereignty and dignity the States retain under our Constitution, *see, e.g.*, *Bond v. United States*, 564 U.S. 211, 220-22 (2011);

South Carolina v. North Carolina, 558 U.S. 256, 267 (2010); *Alden v. Maine*, 527 U.S. 706, 713-14 (1999), and a refusal to recognize sovereign action as immune from the operation of the Sherman Act is an affront to that sovereignty, *see North Carolina Dental*, 135 S. Ct. at 1110. Even aside from the disruption to a State's regulatory choices that delaying an appeal will create, *see infra* Part II, the "ultimate justification" for allowing an immediate appeal is the "importance of ensuring that the States' dignitary interests can be fully vindicated," *Puerto Rico Aqueduct*, 506 U.S. at 146. State-action immunity is not primarily concerned with protecting States and their delegates from liability or from injunctive relief; it is concerned with preserving States' "privilege" to regulate their economies without interference from federal antitrust laws. *Id.* at 146-47 n.5.

Delaying an immediate appeal from a denial of state-action immunity until after final judgment imperils that privilege. It permits, and exacerbates, the "conflicts" between State sovereignty and the antitrust laws that state-action immunity is designed to avoid. *North Carolina Dental*, 135 S. Ct. at 1110. And the costs of allowing immediate appeals for this category of orders are minimal. State-action immunity applies only in a narrow subset of antitrust cases involving state-directed, anticompetitive actions. *Cf. North Carolina Dental*, 135 S. Ct. at 1110-11. Providing an opportunity for immediate appeal in this limited class of cases thus prevents fundamental harm to a State's sovereign interests while causing minimal damage to the traditional rule of finality.

C. State-action immunity and state sovereign immunity derive from the same principles and should be treated the same under the collateral order doctrine.

State-action immunity and state sovereign immunity derive from the same background principle of state sovereignty. Although the two immunities differ in many respects, those differences do not relate to the "decisive consideration" and "crucial question" of the collateral order doctrine—whether permitting immediate appeal for these categories of orders is warranted by the potential peril to the important interests they protect. *Mohawk Indus.*, 558 U.S. at 107-08. The interest imperiled is the same. Both doctrines protect States not only from *actual* liability for sovereign action but also from the interference with that sovereign action created by the *potential* to be haled into court. *See Fundamentals of Antitrust Law* § 2.04[B], at 2-51 ("The *Parker* doctrine is designed to be an immunity, not merely a defense that can be offered at trial.").

In *Puerto Rico Aqueduct*, this Court held that a denial of state sovereign immunity warranted immediate appeal because of "the importance of ensuring that the States' dignitary interests can be fully vindicated." 506 U.S. at 146. The Eleventh Amendment is, of course, not the original source of States' immunity from suit. *Alden*, 527 U.S. at 713. Instead, "the Constitution's structure, its history, and the authoritative interpretations by this Court make clear [that] the States' immunity from suit is a fundamental aspect of the sovereignty which the States

enjoyed before the ratification of the Constitution, and which they retain today." *Id.*

Recognizing that state sovereign immunity is in fact "rooted in a recognition that the States . . . maintain certain attributes of sovereignty," and that it "thus accords the States the respect owed them as members of the federation," this Court determined in *Puerto Rico Aqueduct* that a denial of that immunity warranted immediate appeal. 506 U.S. at 146. State-action immunity is similarly "rooted in a recognition that States . . . maintain certain attributes of sovereignty" and accords States "the respect owed them as members of the federation." *Id.*; *see supra* Part I.A.; *North Carolina Dental*, 135 S. Ct. at 1109-10. State-action immunity preserves "the dignity and essential attributes" that "inhere[]" in sovereign States that retain "primary sovereignty" in some areas and share "concurrent authority" in others. *Alden*, 527 U.S. at 714. Absent an express act of Congress pursuant to its constitutional authority either to abrogate state sovereign immunity or to interfere with States' economic regulation, state sovereigns and their anticompetitive actions are not subject to judicial inquiry; they retain their immunity.

The fact that the Eleventh Amendment is an explicit constitutional provision depriving federal courts of jurisdiction over States does not alter that conclusion. The Eleventh Amendment simply "restore[d] the original constitutional design." *Alden*, 527 U.S. at 722. *Parker* is best read to do the same: to restore the constitutional presumption of state sovereignty with respect to matters of state economic regulation after the expansion of federal authority

threatened it. As Justice Alito explained in setting forth the history of state-action immunity, "[f]or the Congress that enacted the Sherman Act in 1890, it would have been a truly radical and almost certainly futile step to attempt to prevent the States from exercising their traditional regulatory authority." *North Carolina Dental*, 135 S. Ct. at 1119 (Alito, J., dissenting). Accordingly, "the *Parker* Court refused to assume that the Act was meant to have such an effect." *Id.*

Congress may abrogate state sovereign immunity in some instances pursuant to its constitutional authority, *see Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 35 (2012) (plurality opinion), and, although the limits are unclear, Congress may also override State economic regulation pursuant to, among other things, its constitutional authority to regulate interstate commerce. But where Congress has *not* done so, States retain the essential attributes of sovereignty, including an immunity from suit by private parties and an immunity from federal interference with economic regulation of private parties. The affront to that sovereignty led this Court to conclude that state sovereign immunity is a "value of a high order" that must be immediately appealable, *Will*, 546 U.S. at 352, and the same injury occurs when state-action immunity has been denied.

Permitting immediate appeals from a denial of state sovereign immunity but not from a denial of state-action immunity would thus be inconsistent with principles of the collateral order doctrine. Both derive from the reservation of sovereignty embodied in the Constitution, and both protect States' sovereignty from

the indignity of having to wait until after final judgment to be vindicated.

D. The differences between state-action immunity and other immunities support, rather than undermine, the need for immediate appeal.

Relying on the Fourth Circuit's decision in *South Carolina Board of Dentistry v. F.T.C.*, 455 F.3d 436 (2006), the Ninth Circuit cited "three specific incongruities between the state-action doctrine" and other immunities that, if denied, are subject to immediate appeal, including state sovereign immunity. Pet. App. 14a. But like the Fourth Circuit, the Ninth Circuit simply enumerated these distinctions without explaining how they relate to the "decisive consideration" of the collateral order doctrine—the interest imperiled by deferring appellate review. *Mohawk Indus.*, 558 U.S. at 107. In fact, the differences cited by the courts of appeals are either nonexistent or have no bearing on the requirements of the collateral order doctrine. *See* Pet. Br. 42-43. And an examination of these "incongruities" within the framework of the collateral order doctrine reveals that, if anything, they cut in favor of allowing an immediate appeal.

The courts of appeals first noted that municipalities are not protected by the Eleventh Amendment but may benefit from state-action immunity. Pet. App. 15a. But state-action immunity, like state sovereign immunity, recognizes that municipalities "are not themselves sovereign." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985). As a result, a municipality can only benefit from state-action

immunity when it can show the actions in question are *sovereign* actions. *Id.* at 38-39.

The fact that state sovereign immunity corresponds to particular sovereign *entities* and state-action immunity corresponds to particular sovereign *actions* has no bearing on the collateral order doctrine. This "incongruity" reveals the true incongruity of allowing immediate appeals from denials of state sovereign immunity but not denials of state-action immunity. Municipalities are not entitled to sovereign immunity because they are not sovereign; neither are their actions protected by state-action immunity when they are not sovereign actions. But when municipalities' actions *are* sovereign, those actions deserve the same dignity as that afforded to sovereign entities under the federal constitutional framework and Eleventh Amendment. Both are founded on the common principle that the particular immunity should correspond to sovereignty. The right to an immediate appeal should follow that same principle.

The Ninth Circuit also noted that state-action immunity applies to "all antitrust actions, regardless of the relief sought," whereas state sovereign immunity does not bar suits for certain types of prospective relief. Pet. App. 15a (internal quotation marks omitted). But state sovereign immunity *does* bar claims for prospective injunctive relief against States and state entities. *See Cory v. White*, 457 U.S. 85, 91 (1982). It does not bar prospective injunctive relief against state *officials*, *see Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996), because they are not sovereign entities. The fact that state-action immunity could thus be characterized as *broader* and *more* protective than

state sovereign immunity in its effect only demonstrates its importance and the necessity of preserving all sovereign state actions from the operation of the antitrust laws. State officials acting pursuant to official state policy may be sued for prospective equitable relief under the antitrust laws and have no recourse for immediate appeal if state-action immunity is unjustly denied. The breadth of state-action immunity thus supports, rather than undermines, the case for the opportunity to appeal immediately and protect the State's sovereign interests.

Similarly, the fact that state sovereign immunity may not be invoked in an antitrust suit brought by the United States, Pet. App. 15a; *see United States v. Mississippi*, 380 U.S. 128, 140-41 (1965), reinforces the need to ensure proper application of state-action immunity at the outset of litigation in which sovereign actions are in question. Indeed, the Ninth Circuit cited the Eleventh Amendment as a potential alternati "avenue[] for immediate review" where sovereign interests are threatened, Pet. App. 13a n.5, but failed to recognize that the unavailability of that avenue when the United States brings an action makes an opportunity for immediate appeal vital. Immediate appeal from a denial of state-action immunity in these circumstances may be the *only* means of protecting a State's sovereign interests against federal overreach.

Relying on these "incongruities" without examining them in light of the collateral order doctrine, the Ninth and Fourth Circuits overlooked entirely the fact that state-action immunity and state sovereign immunity derive from the same background understanding of

state sovereignty. Given that common background, the two immunities should be treated alike for purposes of the collateral order doctrine.

The Fourth Circuit misses the forest for the trees in concluding that state-action immunity does not "protect against any harm other than a misrepresentation of federal antitrust laws" because it is a limitation on the reach of a statute (the Sherman Act). *South Carolina State Bd. of Dentistry*, 455 F.3d at 444. That reasoning cannot be correct. For example, this Court has previously accepted an appeal under the collateral-order doctrine to decide whether a federal statute contained a sufficiently clear statement abrogating state sovereign immunity. *Seminole Tribe*, 517 U.S. at 52-53, 55-56.

On the Fourth Circuit's simplistic view of *Cohen*, because that clear-statement canon limits the reach of a federal statute, it does not protect against any harm capable of supporting interlocutory appeal. *Contra id.* at 55-56. In reality, the clear-statement rule for abrogation of state sovereign immunity serves important public interests. It gives effect to constitutional separation-of-powers principles, against which Congress is presumed to legislate. Indeed, this Court has held that the clear-statement canon is "[c]losely related" to the clear-statement principle applied in *Parker*: the principle that "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (internal quotation marks omitted); *see Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391, 1395 (5th

Cir. 1996) (quoting that same clear-statement principle as expressed in *Parker*, 317 U.S. at 350-51). As this Court's decisions in *Seminole Tribe* and *Bond* show, interpreting a federal statute in a way that preserves state sovereignty is a principle that protects a substantial public interest.

The rhetorical debate about whether state-action immunity is an "immunity" or a doctrine about the "reach of the Sherman Act" is thus immaterial. *Surgical Care Ctr. of Hammond v. Hosp. Serv. Dist. No. 1*, 171 F.3d 231, 234 (5th Cir. 1999) (en banc). Nor is attaching a conclusory label such as "immunity from liability" or citing past dicta to that effect dispositive. Pet. App. 9a. Indeed, in *Osborn v. Haley* this Court cited an express statutory purpose to create an "immunity from liability" as evidence of congressional intent to create an immunity from *suit*. *See* 549 U.S. 225, 238 (2007) (citing Westfall Act, Pub. L. No. 100-694, § 2(a)(5), 102 Stat. 4563, 4563 (1988)).

The "decisive consideration" for the collateral order doctrine is the *interest* that will be imperiled by deferring appeal and the "crucial question" is whether the potential harm to that interest outweighs the costs of allowing an immediate appeal. *Mohawk Indus.*, 558 U.S. at 107-08. As to an immunity's origin, moreover, this Court's appealability precedents require only a "good pedigree in public law"—not that the immunity be "explicitly guaranteed by a particular constitutional or statutory provision." *Digital Equip*, 511 U.S. at 875 (quotation marks, ellipsis, and alteration omitted).

State-action antitrust immunity under *Parker* easily meets that test. The interest at issue here—the sovereignty retained by the States at the founding—is

a "value of a high order" and animates both state sovereign immunity and state-action immunity. Deferring appellate review of the latter until after final judgment thwarts the rationale for state-action immunity entirely, just as it would for state sovereign immunity. And state-action immunity has a firm footing in public law, resting on "basic principles of federalism embodied in the Constitution." *Bond*, 134 S. Ct. at 2090. The Court's decision in *Parker* was a direct response to the threat posed to state sovereignty by the federal government's expanding powers under the Commerce Clause.

II. Deferring Appellate Review of Denials of State-Action Immunity Impinges on States' Sovereign Power to Engage in Economic Regulation

A. State-action immunity furthers federalism principles by preserving States' sovereign authority to regulate their economies.

This Court's decision in *Parker* to "confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity" is firmly rooted in federalism principles. *North Carolina Dental*, 135 S. Ct. at 1110; *see also Ticor*, 504 U.S. at 633 ("The principle of freedom of action for the States, adopted to foster and preserve the federal system, explains the later evolution and application of the *Parker* doctrine[.]"); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985) ("The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their

domestic commerce."); *supra* Parts I.A., I.C. Affording immunity to States and their delegates "preserves to the States their freedom under our dual system of federalism" to "administer state regulatory policies free of the inhibitions of the federal antitrust laws." *Lafayette*, 435 U.S. at 415 (plurality opinion).

State-action immunity necessarily contemplates that, in exercising their sovereign authority to regulate their economies, States will do so in ways that are both consistent and inconsistent with federal antitrust laws. *See North Carolina Dental*, 135 S. Ct. at 1109. When States choose to "impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives," principles of federalism require that the national policy favoring free competition yield to the States' policy interests. *Id; see also* Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 Colum. Bus. L. Rev. 335, 347 (2004) (the purpose of state-action immunity is "not to protect federal regulatory or competition goals, but to give appropriate recognition to state regulatory power"). Otherwise, "the States' power to engage in economic regulation would be effectively destroyed." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978); *see also North Carolina Dental*, 135 S. Ct. at 1109-10 ("If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate.").

Moreover, this Court's decisions extending state-action immunity to municipalities and other entities to whom States have delegated their regulatory authority correctly recognize that States achieve their policy interests through a wide array of regulatory structures. *See, e.g.*, *Phoebe Putney*, 568 U.S. at 224-25 ("Following *Parker*, we have held that under certain circumstances, immunity from the federal antitrust laws may extend to nonstate actors carrying out the State's regulatory program." (citing *Patrick v. Burget*, 486 U.S. 94, 99-100 (1988), and *Southern Motor Carriers*, 471 U.S. at 56-57)). States sometimes regulate industries and professions directly. *See, e.g.*, *Bates v. State Bar of Arizona*, 433 U.S. 350, 359-63 (1977) (affording state-action immunity to Arizona Supreme Court in action challenging rules adopted by the court to regulate attorneys). Other times, however, States delegate their regulatory authority to state agencies, *see, e.g.*, *Deak-Perera Hawaii, Inc. v. Dep't of Transp.*, 745 F.2d 1281, 1282-83 (9th Cir. 1984) (affording state-action immunity to Hawaii's Department of Transportation); political subdivisions, *see, e.g.*, *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 370-74 (1991) (affording state-action immunity to a municipality); and even private entities, *see, e.g.*, *Southern Motor Carriers*, 471 U.S. at 65 (affording state-action immunity to motor common carriers). The States' diverse regulatory approaches are unsurprising given the diverse industries and professions the States regulate. *See* Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 Cal. L. Rev. 1567, 1569 n.4 (2017) (the average state has thirty-nine occupational licensing boards); Hovenkamp, *supra*, at 346 (noting that "States and local governments regulate residential rents, liquor

pricing, intrastate trucking rates, insurance, and taxi fares," among other industries).

In short, state-action immunity was intended to further principles of federalism by ensuring States' "freedom of action," *Ticor*, 504 U.S. at 633, and the availability of a "range of regulatory alternatives," *Southern Motor Carriers*, 471 U.S. at 61, when they exercise their sovereign authority to regulate their economies.

B. Delaying appellate review of orders denying state-action immunity to public entities would undermine federalism principles.

If Sherman Act defendants are precluded from immediately appealing orders denying state-action immunity to public entities, the very federalism principles that state-action immunity is intended to further will be directly undermined.

Much like the doctrine of qualified immunity, state-action immunity accomplishes its aim of giving States and their delegates "freedom of action" and regulatory flexibility by liberating them from the fear that their actions will lead to burdensome and costly litigation. *See Lafayette*, 435 U.S. at 415 (plurality opinion) (state-action immunity "preserves to the States their freedom . . . to administer state regulatory policies free of the inhibitions of the federal antitrust laws"). In *Mitchell v. Forsyth*, this Court explained that the doctrine of qualified immunity is animated by the principle that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served

by action taken 'with independence and without fear of consequences." 472 U.S. 511, 525 (1985) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)).

The "consequences" with which the Court was concerned included not only liability for money damages, but also "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell*, 472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 816). As the Eleventh Circuit has explained, "[a]bsent state immunity[,] local officials will avoid decisions involving antitrust laws which would expose such officials to costly litigation and conclusory allegations." *Commuter Transp. Sys. v. Hillsborough County Aviation Auth.*, 801 F.2d 1286, 1289 (11th Cir. 1986); *see also We, Inc. v. City of Philadelphia*, 174 F.3d 322, 329 (3d Cir. 1999) (noting that the burdens of antitrust litigation might deter public officials from "vigorous execution of their office" (quoting *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987) (Posner, J.))).

The only way to free States and their delegates from the chilling effect caused by the threat of burdensome antitrust litigation is to ensure that questions of state-action immunity are conclusively litigated at the earliest possible stage of the litigation. Otherwise, there is no guarantee that state and public entities and officials who engage in actions entitled to state-action immunity under this Court's precedents will not be subjected to protracted and costly litigation under federal antitrust law, distracting them from their duties and thereby interfering with the State's ability

to effectively implement its regulatory policies. And the mere risk of such litigation will inhibit States from fully exercising their regulatory discretion, in contravention of the federalism principles underlying state-action immunity. *See Fundamentals of Antitrust Law* § 2.04[B], at 2-52 (emphasizing "[t]he importance of *Parker*'s status as an immunity" because of the possibility that public entities and officials could be "intimidated from carrying out their regulatory obligations by threats of costly litigation, even if they might ultimately win").

The need for immediate review of orders denying state-action immunity to public entities is especially strong given the legal uncertainty that exists regarding the precise contours of state-action immunity. *Cf. Jones v. Johnson*, 26 F.3d 727, 727 (7th Cir. 1994) (per curiam) (noting that immediate appeal of immunity issues allows officials to "seek protection from legal uncertainty"). Despite its importance to state sovereignty and federalism, the doctrine of state-action immunity "has continued to spawn more confusion and litigation than certainty." *See* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 674 (1991).

As but one example, in the wake of this Court's decision in *North Carolina Dental*, the States must predict how lower courts will make the legal determinations whether an entity is a "nonsovereign actor whose conduct does not automatically qualify as that of the sovereign State" and whether "active market participants" constitute a "controlling number" of its membership. 135 S. Ct. at 1111, 1114; *see id.* at 1123 (Alito, J., dissenting) (observing that the test

adopted by the majority "raises many questions," the answers to which "are not obvious"); Allensworth, *Foxes at the Henhouse*, *supra*, at 1590 (noting that States wishing to "reconsider their board composition to avoid antitrust liability" must attempt to "predict[] how the courts will interpret *North Carolina Dental*'s language"). And as for *North Carolina Dental*'s requirement that state occupational licensing boards controlled by "active market participants" be subject to "active supervision" by the State, 135 S. Ct. at 1113, this Court acknowledged that it had "identified only a few constant requirements of active supervision" and that "the adequacy of supervision otherwise will depend on all the circumstances of a case," *id.* at 1116-17.

Given these and other unsettled legal questions, States attempting to exercise their sovereign authority to regulate their economies often find themselves unable to predict with any certainty whether a given regulatory structure will be entitled to state-action immunity. This uncertainty and the concomitant threat of antitrust liability hinder States from effectively carrying out their regulatory policies and deter "able citizens" from participating in their regulatory efforts. *Hoover v. Ronwin*, 466 U.S. 558, 580 n.34 (1984). These problems will only be exacerbated if the public entities and individuals sued as a result of the State's actions are unable to immediately appeal an order denying them state-action immunity.

Allowing immediate appeals from an orders denying state-action immunity to public entities, by contrast, will ensure that State officials and other entities and individuals the State has enlisted to implement its

economic policy are able to carry out their duties without fear of being subjected to costly and protracted litigation. This, in turn, will ensure that States retain "their freedom under our dual system of federalism" to "administer state regulatory policies free of the inhibitions of the federal antitrust laws." *Lafayette*, 435 U.S. at 415 (plurality opinion).

III. Deferring Appellate Review of Denials of State-Action Immunity Would Be Inefficient and Would Needlessly Increase Costs for States and the Judiciary

The costs of deferring appellate review of a denial of state-action immunity are various and significant. The significance of those costs also militates in favor of allowing an immediate appeal from an order denying a public entity's claim of state-action immunity.

First, like qualified immunity, state-action immunity protects against the untoward disruption of governmental functions and permits government policymakers to exercise their regulatory discretion unchilled by the threat of litigation. *See Mitchell*, 472 U.S. at 525-26; *supra* Part II. It comes at a high cost to this substantial public interest when the public entity is made to litigate to final judgment before it can appeal an erroneous denial of state-action immunity. Without an immediate appeal, the intended protection evaporates and the threat of litigation will have a chilling effect on government policymakers.

Second, the financial costs and the burdens of defense in antitrust litigation are extraordinarily high. To mitigate those costs and burdens—which are ultimately borne by the citizens—States and their

political subdivisions have an important interest in dismissal of antitrust claims at the earliest stage possible whenever dismissal is legally appropriate. "Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009).

Third, antitrust litigation is costly not just for litigants but also for courts; it can easily consume a vast amount of judicial time and judicial resources. Immediate appellate review of a denial of a claim of state-action immunity to a public entity is, therefore, efficient; it can prevent the waste of judicial resources expended in a trial that, at the end, proves to have been unwarranted. Thus, courts themselves have a vested interest in the early-stage dismissal of antitrust claims that cannot lead to redress.

An appeal from a final judgment cannot adequately safeguard these important state and judicial interests or adequately protect against financial burdens needlessly imposed by forcing a public entity entitled to state-action immunity to engage in the full litigation process. *See Commuter Transp. Sys.*, 801 F.2d at 1289 ("The purpose of the state action doctrine is to avoid needless waste of public time and money."). On the other hand, allowing an immediate appeal to avoid an unnecessary trial when a State or public entity is in fact immune will protect significant public interests, obviate, or at least lessen, unnecessary financial expenditure, foster efficiency, and conserve judicial resources.

It is widely recognized that antitrust litigation is especially and prohibitively costly. Indeed, this Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), is predicated in good measure on the fact that antitrust litigation is notoriously expensive. The complex and protracted discovery inherent in the early stages of antitrust litigation accounts for much of that expense. *Id.* at 558 (citing *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation) ("[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase.")). *Twombly* thus admonished courts not "to forget that proceeding to antitrust discovery can be expensive." *Id.* at 558-59 (citing, *inter alia*, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887, 1898-99 (2003) (discussing the unusually high cost of discovery in antitrust cases); Manual for Complex Litigation, Fourth, § 30, p. 519 (2004) (describing extensive scope of discovery in antitrust cases); and Memorandum from Hon. Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000) (reporting that discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed)).

Twombly stands for the general proposition that, when allegations in a complaint, however true, cannot raise a claim of entitlement to relief, the claim should be dealt with "at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558 (quoting 5 C. Wright & A.

Miller, Federal Practice and Procedure § 1216, at 233-234 (3d ed. 2004)). The point of minimum expenditure in an antitrust case, in particular, comes before the case proceeds to discovery. *Twombly*, 550 U.S. at 558 (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) ("[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.")).

If a state defendant in an antitrust case is entitled to state-action immunity—whether that immunity is viewed as immunity from suit or immunity from liability—there is no reasonable likelihood that the plaintiff can raise a claim of entitlement to relief or recovery. There is thus every reason to allow the state-action immunity issue to be appealed before the parties and the court are faced with the exorbitant costs of discovery and trial—i.e., to deal with the issue "at the point of minimum expenditure of time and money by the parties and the court."

If anything, antitrust litigation has become even more costly and more burdensome today due to the exponential increase in electronic and paper records and the ubiquity of full-blown electronic discovery. *See SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F. 3d 412, 445 (4th Cir. 2015) (Wilkinson, J., concurring in part and dissenting in part). And, because the high cost of antitrust litigation largely falls on the defendants, it "can have an extortionate effect, compelling some defendants to enter early settlement even in meritless suits." *Id.* at 434 (majority opinion). This Court has

likewise called attention to the *in terrorem* clout of the high cost of antitrust litigation which can drive "cost-conscious defendants to settle even anemic cases" before discovery. *Twombly*, 550 U.S. at 559. States and their subdivisions have, of course, a special duty to their citizens to be cost conscious.

In short, antitrust litigation is especially and increasingly expensive because it is legally and factually complex, inevitably requires massive discovery, cannot be conducted without a battery of highly compensated expert witnesses, and, concomitantly is of protracted duration. *See, e.g.*, *Corr Wireless Commc'ns, L.L.C. v. AT&T, Inc.* 893 F. Supp. 2d 789, 809-10 (N.D. Miss. 2012); *Nespresso USA, Inc. v. Ethical Coffee Co. SA*, 263 F. Supp. 3d 498, 508 (D. Del. 2017) (highlighting "the financial burden of the discovery process in general, but particularly in antitrust cases"). Those costs counsel strongly in favor of application of the collateral order doctrine to allow interlocutory appeals of the denial of claims of state-action immunity in antitrust cases.

Applying the collateral order doctrine to accommodate this discrete class of rulings would be consistent with the requisite "stringent" application of the doctrine and would not pose any risk of "overpower[ing]" the interests of finality in litigation. *Will*, 546 U.S. at 350. Nor would this application of the collateral order doctrine burden the judiciary with "piecemeal, prejudgment appeals" that "undermine[] efficient judicial administration." *Mohawk Indus.*, 558 U.S. at 106 (internal quotation marks omitted). Neither concern is implicated in the context of state-action immunity. *Mohawk* dealt with routine,

privilege-related disclosure orders, which, like many discovery orders, arise repeatedly in the course of a single case. By contrast, the state-action immunity question is a discrete and conclusive question of law. Allowing an immediate appeal on this conclusive, single, and separate issue in the very limited context of state-action immunity in antitrust litigation against public entities will not invite piecemeal litigation or cut against finality interests. Rather interlocutory appeal of a denial of state-action immunity to a public entity will advance judicial efficiency and is the only way to adequately provide States and their subdivisions meaningful relief from the costs and burdens of unwarranted litigation.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

Herbert H. Slatery III
Attorney General and Reporter
State of Tennessee

Andrée S. Blumstein
Solicitor General
Counsel of Record

Sarah K. Campbell
Special Assistant to the Solicitor General
and the Attorney General

Jonathan David Shaub
Assistant Solicitor General

Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 741-3492
andree.blumstein@ag.tn.gov

Counsel for Amicus Curiae
State of Tennessee

Counsel for Additional *Amici*

MARK BRNOVICH
Attorney General
State of Arizona
1275 W. Washington St.
Phoenix, AZ 85007

LESLIE RUTLEDGE
Attorney General
State of Arkansas
323 Center St.
Suite 200
Little Rock, AR 72201

CYNTHIA H. COFFMAN
Attorney General
State of Colorado
1300 Broadway
Denver, CO 80203

CHRISTOPHER M. CARR
Attorney General
State of Georgia
40 Capitol Sq., S.W.
Atlanta, GA 30334-1300

GORDON MACDONALD
Attorney General
State of New Hampshire
33 Capitol Street
Concord, NH 03301

MICHAEL DEWINE
Attorney General
State of Ohio
30 E. Broad St.
17th Floor
Columbus, OH 43215

PETER F. KILMARTIN
Attorney General
State of Rhode Island
150 S. Main St.
Providence, RI 02903

ALAN WILSON
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211

LAWRENCE G. WASDEN
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720-0010

CURTIS T. HILL, JR.
Attorney General
State of Indiana
200 West Washington St.
Room 219
Indianapolis, IN 46204

JEFF LANDRY
Attorney General
State of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804

DEREK SCHMIDT
Attorney General
State of Kansas
120 SW 10th Avenue
2nd Floor
Topeka, KS 66612-1597

JIM HOOD
Attorney General
State of Mississippi
P.O. Box 220
Jackson, MS 39205

MARTY J. JACKLEY
Attorney General
State of South Dakota
1302 E. Highway 14
Suite 1
Pierre, SD 57501-8501

KEN PAXTON
Attorney General
State of Texas
P.O. Box 12548
Austin, TX 78711-2548

SEAN D. REYES
Attorney General
State of Utah
P.O. Box 142320
Salt Lake City, UT 84114

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State St.
Montpelier, VT 05609

PATRICK MORRISEY
Attorney General
State of West Virginia
State Capitol Bldg. 1
Room E-26
Charleston, WV 25305

JOSHUA D. HAWLEY
Attorney General
State of Missouri
Supreme Ct. Bldg.
207 W. High Street
Jefferson City, MO 65101

TIMOTHY C. FOX
Attorney General
State of Montana
P.O. Box 201401
Helena, MT 59620

DOUGLAS J. PETERSON
Attorney General
State of Nebraska
2115 State Capitol Bldg.
Lincoln, NE 68509

BRAD D. SCHIMEL
Attorney General
State of Wisconsin
P.O. Box 7857
Madison, WI 53707

PETER K. MICHAEL
Attorney General
State of Wyoming
2320 Capitol Ave.
Cheyenne, WY 82002